Supreme Court, U.S.
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No. 02-___

In The

Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN B. LEWIS
Counsel of Record
THOMAS J. PIATAK
GREGORY V. MERSOL
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING (800) 225-6964
OR CALL COLLECT (402, ...-2831

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QUESTIONS PRESENTED

Whether the "full and equal benefit" clause of 42 U.S.C. § 1981(a) applies to private entities that are not acting under color of state law.

What is the proper scope of the "full and equal benefit" clause of 42 U.S.C. § 1981(a).

LIST OF PARTIES AND AFFILIATES

Pursuant to Rule 29.6 of the Rules of this Court, The Higbee Company, d/b/a Dillard Department Stores, Inc., states that its parent company is Dillard's, Inc. and no publicly held company owns more than 10% of the stock of Dillard's, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Higbee Company, d/b/a Dillard Department Stores, Inc. ("Dillard's") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Sixth Circuit is published at 319 F.3d 825 (6th Cir. 2003) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1. The prior opinion of the Court of Appeals is published at 256 F.3d 416 (6th Cir. 2001) and is reproduced at Pet. App. 35. The unreported memorandum and opinion of the United States District Court for the Northern District of Ohio, Patricia Hemann, Magistrate Judge, granting Dillard's summary judgment on June 29, 1999 is reproduced at Pet. App. 110. Magistrate Judge Hemann's judgment entry of June 30, 1999 is reproduced at Pet. App. 109. An amended memorandum and opinion was issued by Magistrate Judge Hemann on July 23, 1999 and is reproduced at Pet. App. 98. Finally, on August 9, 1999, Magistrate Judge Hemann issued an order, after reconsideration, reaffirming her prior decision. Pet. App. 96.

JURISDICTION

The Court of Appeals entered its en banc decision on February 11, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 42, Section 1981 provides:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

STATEMENT OF THE CASE

This case arises out of Lynette Chapman's ("Chapman") visit to a Dillard's store in Cleveland, Ohio, on February 20, 1997. During the course of this visit, Chapman was briefly searched after a sales associate, Debra Hughes, suspected her of shoplifting. Both Hughes and Chapman are African-American.

The Magistrate Judge, sitting by the parties' consent, granted Dillard's summary judgment on Chapman's claim that Dillard's violated her rights under 42 U.S.C. Section 1981 ("Section 1981") and under the Fourth and Fifth Amendments to the Constitution of the United States.[1] The Magistrate Judge held that Chapman did not have a claim under the "full and equal benefit" clause of Section 1981 because that clause required state action. Pet. App. 104. The Magistrate Judge's opinion was affirmed by a panel decision of the Sixth Circuit. Pet. App. 36.

On rehearing en banc, the Sixth Circuit reversed, holding that the "full and equal benefit" clause of Section 1981 applies to private actors as well as state actors. Pet. App. 2. This decision puts the Sixth Circuit in direct conflict with the Third, Fourth, and Eighth Circuits, each of which have held that the "full and equal benefit" clause of Section 1981 requires state action.[2] The Second Circuit,

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[1] Chapman did not plead a claim under 42 U.S.C. Section 1983, even though the Magistrate Judge's opinion referred to such a claim. Chapman raised deprivations of the Fourth and Fifth Amendments to the United States Constitution as part of her Section 1981 claim.

[2] The decision of the Fourth Circuit was reversed in part by this Court on other grounds. *Shaare Tefila Congregation v. Cobb*, 785 F.2d

(Continued on following page)

like the Sixth, has concluded that there is no state action requirement under the "full and equal benefit" clause of Section 1981.

The Court should grant certiorari to resolve this decisional conflict.

A. Statutory Background

Title 42, Section 1981 is a civil rights statute whose legislative history and meaning this court has examined "on more than one occasion." *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982). Section 1981 originated in the Civil Rights Act of 1866, ch. 31, Section 1, 14 Stat. 27, which was enacted by Congress shortly after ratification of the Thirteenth Amendment. *General Bldg. Contractors*, 458 U.S. at 384. Following ratification of the Fourteenth Amendment, Congress passed the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which, at Section 16, contained essentially the same language currently reflected in Section 1981(a). 458 U.S. at 385. That provision provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and actions of every kind, and no other."

523, 525-26 (4th Cir. 1986), *rev'd in part on other grounds*, 481 U.S. 615 (1987).

This Court has regularly resolved disputes regarding the scope of Section 1981. More than 100 years ago, the Court explained that the rights protected by Section 1981 were intended solely "to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." *The Civil Rights Cases*, 109 U.S. 3, 16 (1883). Under this view, Section 1981 could not "be impaired by the wrongful acts of individuals, unsupported by State authority." *Id.* at 17. Subsequently, the Court adopted a different interpretation of the "make and enforce contracts" clause, concluding that Section 1981 "prohibits racial discrimination in the making and enforcement of *private* contracts." *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (emphasis added). This Court has never addressed the scope of the "full and equal benefit" clause of Section 1981, and most litigation under the statute has focused on interpreting the "make and enforce contracts" clause.

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court held that Section 1981 did not reach conduct after a contract was formed. In light of the Court's decision in *Patterson*, Congress amended Section 1981 through enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Congress redesignated the pre-existing language of Section 1981 as subsection (a), and added subsections (b) and (c). Subsection (b) defines "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 101, 105 Stat. at 1072. Subsection (c), in turn, provides that the "rights protected by [Section 1981] are protected against impairment by nongovernmental discrimination and

impairment under color of State law." *Id.* The Court has recognized that "§ 101 . . . amended the 1866 Civil Rights Act's prohibitions of racial discrimination in 'mak[ing] and enforce[ment] [of] contracts' . . . in response to *Patterson v. McLean Credit Union.*" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

The Sixth and Second Circuits relied upon this 1991 amendment to Section 1981 to conclude that the "full and equal benefit" clause reaches private action. This case presents the recurring issue of the proper scope of the "full and equal benefit" clause of Section 1981.

B. Factual Background

Chapman was a regular Dillard's customer who frequently shopped at its downtown Cleveland store without incident. On February 20, 1997, Chapman again visited that store to purchase a pair of men's shoes for her husband's birthday. Chapman did not buy any shoes, however, because Dillard's did not have the style that she was looking for.

After leaving the men's shoes area, Chapman went to the women's department to "look around." There she decided to try on a suit and briefly spoke with a sales associate who offered her assistance. Chapman told the associate that she wished to try the suit on, but could not do so because the nearby dressing room was in use. The assistant helped her by directing her to a fitting room in another area of the store. Chapman looked at two more outfits and eventually selected one to try on. Debra Hughes, while she was responding to another customer on the telephone, directed Chapman to a nearby fitting room.

Chapman then entered the fitting room and saw an electronic security device known as a "kno-go" on the floor. Chapman, who had worked in retail clothing in the past, recognized that the disconnected device was suspicious and opened the fitting room door to tell Hughes about it. Unable to see Hughes standing where she had been, Chapman walked out into the store but could not find her.

After Chapman left the area to return clothing she did not want, Hughes discovered the "kno-go" on the floor of the dressing room. Suspicious, and believing Chapman to have been the last customer to use the dressing room, Hughes contacted store security.

After returning the unwanted clothes, Chapman was approached by a security guard named Sam Mendise. Mendise informed her that Hughes had found a "kno-go" sensor device in the fitting room that she had just exited and politely asked to check her purse.

At Mendise's request, Chapman opened her purse so that he could verify that it contained no stolen merchandise. He then told her that it would also be necessary to check her clothes. He asked a female manager for assistance, who in turn asked Chapman if she would accompany her to a fitting room.

In the fitting room, the manager searched Chapman's purse again at Chapman's insistence. Upon request, Chapman removed her coat and suit jacket, and lifted her shirt. Chapman was prepared to remove her blouse, but the Dillard's manager told her not to do so. The manager was satisfied that no merchandise had been taken, and apologized to Chapman for the inconvenience. At no time was Chapman placed under arrest, accused of any crime, or even refused service.

C. Proceedings Below

The district court granted summary judgment to Dillard's on Chapman's Section 1981 claim, holding that a claim under the "full and equal benefit" clause of Section 1981 required state action. Pet. App. 104. A panel of the Sixth Circuit affirmed, finding that the plain language of Section 1981 required State action under the "full and equal benefit" clause: "Implicit in the concept of 'full and equal benefit of all laws and proceedings for the security of persons and property' is state action. In other words, because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." 256 F.3d at 420-21. Pet. App. 41. Because the court concluded that state action was implicit in the plain language of Section 1981(a), it held that reading Section 1981(c) to make private entities liable under the "full and equal benefit" clause would create an internal inconsistency within the statute. 256 F.3d at 421. Pet. App. 42.

The court also declined to read Section 1981(c) as making private entities liable under the "full and equal benefit" clause since such an interpretation "creates the absurd result of federalizing state tort law." 256 F.3d at 421. Pet. App. 42. The court further rejected such a reading of Section 1981(c) because it "is inconsistent with the intent of Congress. . . . The legislative history reflects that in adding subsection (c) to the statute, Congress merely codified *Runyon v. McCrary*, 427 U.S. 160 (1976), which held that Section 1981's contract clause applied to private entities." 256 F.3d at 421. Pet. App. 43.

Chapman petitioned for rehearing en banc and the Sixth Circuit ultimately reversed the district court's grant

of summary judgment, holding that "Section 1981 is unambiguous. According to subsection (c), the rights protected by Section 1981 are 'protected against impairment by nongovernmental discrimination.'" 319 F.3d at 829-30. Pet. App. 6. The court further reasoned that "Section 1981 explicitly protects the right 'to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens;' therefore, that right is 'protected against impairment by nongovernmental discrimination.'" 319 F.3d at 830. *Id.*

The court rejected Dillard's argument that such a reading of Section 1981(c) would produce the absurd result of federalizing state tort laws: "A result . . . is not absurd merely because it does not comport with one's notion of what constitutes good policy." 319 F.3d at 832. Pet. App. 11. The court agreed with Dillard's that the legislative history of Section 1981(c) reflected a desire to codify *Runyon v. McCrary*, but stated that "Congress's failure to comment upon statutory language simply does not constitute a rejection of the plain import of that language." 319 F.3d at 832. Pet. App. 10. Finally, the court noted that "[t]he Supreme Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), . . . precludes this court from finding subsection (c)'s plain language inconsistent with the statute's equal benefit provision." 319 F.3d at 831. Pet. App. 8.

In dissent, Judge Suhrheinrich noted that "a plain reading of subsection (c) is inconsistent with § 1981's equal benefit clause, which implicitly incorporates the concept of state action. . . . [A]n individual is only deprived of the full and equal benefit of all laws and proceedings if he or she is impaired or prevented from enforcing through legal process

his or her established rights. To read the statute any differently is simply illogical." 319 F.3d at 838. Pet. App. 24.

Judge Suhrheinrich observed that Section 1985(3) – the statute construed in *Griffin v. Breckinridge* – was significantly different from Section 1981, since it "expressly references 'two or more persons.'" 319 F.3d at 839. Pet. App. 26. Judge Suhrheinrich further noted that "it is clear that the *explicit* mention of private persons on the face of the statute was critical to the *Griffin* court's holding that § 1985(3) applies to private action." 319 F.3d at 840 (emphasis in original). Pet. App. 29.

Judge Suhrheinrich also wrote that "Congress's intent in enacting subsection (c) could not have been any clearer. It intended to prohibit racial discrimination 'in all contracts,' because that is what is said, and only contracts, *because that is all it wrote*." 319 F.3d at 841 (emphasis in original). Pet. App. 31. Finally, Judge Suhrheinrich cautioned that "[u]nder the majority's interpretation, the equal benefit clause conceivably can be applied to every garden-variety state tort law claim where the parties are of different races." 319 F.3d at 842. Pet. App. 33.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the court of appeals' decision is in direct conflict with decisions from the Third, Fourth, and Eighth Circuits. The court of appeals held that state action is not required to bring a claim under the "full and equal benefit" clause of 42 U.S.C. Section 1981, a conclusion also reached by the Second

Circuit. By contrast, the Third, Fourth, and Eighth Circuits, together with a large majority of district courts, have held that claims under the "full and equal benefit" clause of Section 1981 do require state action. Thus, there is a direct conflict among the courts of appeals on whether state action is a prerequisite to bringing a claim under Section 1981.

The question over which the courts of appeals are divided is surely an important one. Section 1981 is the nation's most venerable civil rights statute, and the Court has regularly resolved conflicts over its proper scope. The Court's guidance is needed here because allowing claims under the "full and equal benefits" clause against private entities not acting under color of law raises the prospect of federalizing state tort law, a result the Court has regularly sought to avoid. If private parties are deemed capable of depriving others of the "full and equal benefit" of the laws, "it is difficult to imagine what such a deprivation would be, other than a violation of the state laws themselves, coupled with racial animus." *Spencer v. Casavilla*, 839 F. Supp. 1014 (S.D.N.Y. 1993). Resolution of the proper scope of Section 1981 is important to securing a proper balance between state and federal law with respect to the obligations of retailers and other businesses to their customers and visitors.

The guidance of the Court is also needed to delineate the parameters of a claim under the "full and equal benefit" clause, regardless of whether such claims encompass private actors. Unlike the "make and enforce contracts" clause of Section 1981, there is currently virtually no judicial guidance on the standards governing claims brought under the "full and equal benefit" clause. Adoption of a uniform national standard is necessary to ensure that

both consumers and businesses will know the scope of their respective rights and obligations under Section 1981.

ARGUMENT

The Decision Below Presents A Conflict Among The Courts Of Appeals As To Whether The "Full and Equal Benefit" Clause Of 42 U.S.C. § 1981 Applies To Purely Private Entities, An Issue Of Surpassing National Importance

A. The Courts Of Appeals Have Divided Over Whether Claims Under The "Full and Equal Benefit" Clause Of Section 1981 Require State Action

In its en banc decision, the Sixth Circuit reversed the prior decision of a three-judge panel and held that "section 1981 plainly protects against impairment of its equal benefit clause by private discrimination." *Chapman v. The Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003). Pet. App. 13. Shortly before this decision was made, the Second Circuit reached the same conclusion in *Phillip v. University of Rochester*, 316 F.3d 291 (2d Cir. 2003). In *Phillip*, the Second Circuit stated "we believe that the 1991 amendment [to Section 1981] removes any doubt that the conduct of private actors is actionable under the equal benefit clause of Section 1981." 316 F.3d at 296. The Second Circuit also noted the growing conflict on this issue among the courts of appeals, stating "we respectfully differ with

the contrary conclusion reached by the Eighth and Third Circuits." *Id.*[3]

In contrast to the Sixth Circuit and the Second Circuit, the Third, Fourth, and Eighth Circuits have all held that state action is required to state a claim under the "full and equal benefit" clause of Section 1981. In *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), the court concluded from the plain language of the statute that a claim under the "full and equal benefit" clause required state action:

> The words "full and equal benefit of all laws and proceedings for the security of persons and property" . . . suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of Section 1981, the concept of state action is implicit in the equal benefit clause.

Id. at 1029.

The Third Circuit recently reaffirmed its holding in *Waddle* in *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir. 2001) ("Moreover, even if we were to consider them, such

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[3] Several district courts have also concluded that the "full and equal benefit" clause of Section 1981 reaches private actors. *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712 (D.P.R. 1992); *Carey v. Rudeseal*, 703 F. Supp. 929 (N.D. Ga. 1988); *Hawk v. Perillo*, 642 F. Supp. 380 (N.D. Ill. 1985); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969).

'full and equal benefit' claims would fail in light of a substantial line of authority holding that only state actors can be sued under the 'full and equal benefit' clause of section 1981").

The reasoning of *Waddle* was echoed in the panel decision reversed by the Sixth Circuit's en banc decision. *Chapman v. The Higbee Co.*, 256 F.3d 416, 421 (6th Cir.), *vacated*, 270 F.3d 297 (6th Cir. 2001) ("because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law"). Pet. App. 80. The Second, Fourth and Eighth Circuits have also concluded that private conduct is not implicated by the "full and equal benefit" clause, and these decisions have all cited *Waddle*, the panel decision in *Chapman*, or both. *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769, 777 (8th Cir. 2001) ("[B]ecause the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law") (citing *Waddle* and *Chapman*); *Youngblood v. Hy-Vee Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001) ("Because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law") (citing *Waddle* and *Chapman*); *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 525-526 (4th Cir. 1986), *rev'd in part on other grounds*, 481 U.S. 615 (1987) ("We . . . agree with the Third Circuit's interpretation of the 'full and equal benefit' clause . . . and conclude that state action is required to assert a claim under that statute") (citing *Waddle*).[4]

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[4] The reasoning of *Waddle* has also been followed by the majority of other courts that have considered the issue, both before and after the amendment of Section 1981 in 1991. *Muick v. Wicks*, No. 3:01-CV-0130-M,

(Continued on following page)

The courts of appeals and other lower courts are thus sharply divided on whether the "full and equal benefit" clause of Section 1981 applies to private actors. This division is irreconcilable, because it is the result of different understandings of the statute, not differing factual patterns.

B. The Proper Scope Of The "Full and Equal Benefit" Clause Of Section 1981 Presents An Important And Recurring Issue Of Federal Law

This conflict among the courts of appeals also concerns an important and recurring issue of federal law, Section 1981's proper scope. Indeed, the Court has recognized the

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2001 U.S. Dist. LEXIS 14135 (N.D. Tex. July 24, 2001), *12 ("[A]bsent state action, Plaintiffs' Section 1981 claim [under the 'full and equal benefit' clause] is untenable and, as a result, it is frivolous"); *Sterling v. Kazmierczak*, 983 F. Supp. 1186, 1192 (N.D. Ill. 1997); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371 (D. Del. 1996); *Spencer v. Casavilla*, 839 F. Supp. 1014, 1018 (S.D.N.Y. 1993), *aff'd*, 44 F.3d 74 (2d Cir. 1994) ("Most of the decisions interpreting them have held that state action is required to state a claim under the 'equal benefit' and 'like punishment' clauses of § 1981"); *Rochon v. Dillon*, 713 F. Supp. 1167, 1172 (N.D. Ill. 1989) ("[O]ther circuits have decided that question in the negative, on the ground that such a claim necessarily implicates governmental action"); *Thompson v. Wise Gen. Hosp.*, 707 F. Supp. 849, 853 (W.D. Va. 1989), *aff'd*, 896 F.2d 547 (4th Cir. 1990); *Chiles v. Crooks*, 708 F. Supp. 127, 132 (D.S.C. 1989); *Provisional Gov't of Republic of New Afrika v. ABC*, 609 F. Supp. 104, 109 (D.D.C. 1985); *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F. Supp. 1344, 1353 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984); *Williams v. Northfield Mount Hermon Sch.*, 504 F. Supp. 1319, 1332 (D. Mass. 1981).

significance of this issue by repeatedly resolving conflicts concerning it.[5]

Defining the proper scope of the "full and equal benefit" clause of Section 1981 also touches on another area of continuing concern to the Court – the proper balance between federal and state law. Courts have not provided practical tests for determining what constitutes a deprivation of "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." As the district court noted in *Spencer v. Casavilla*:

> It is difficult to imagine what such a deprivation would be other than a violation of the state laws themselves, coupled with a racial animus. Reading

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[5] *See, e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (holding that 1991 Amendments to Section 1981 apply prospectively only); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989) (holding that Section 1983 provides "the exclusive federal damages remedy for the violation of the rights guaranteed by Section 1981 when the claim is pressed against a state actor"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 176 (1989) (reaffirming that Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts" but is not "a general proscription of racial discrimination in all aspects of contract relations"); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that Section 1981 applies to discrimination based upon "ancestry or ethnic characteristics"); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that Section 1981 "can be violated only by purposeful discrimination"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295, 296 (1976) (holding that Section 1981 prohibited "discrimination in the making or enforcement of contracts against . . . any race" including "white[s]"); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (ruling that Section 1981 applied to private contracts); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (stating that Section 1981 applies to private employment contracts).

> the clause to encompass this kind of conduct, however, risks creating a section 1981 action "whenever a white man strikes a black [man] in a barroom brawl". . . . Extending the "equal benefit" clause to private conduct would have the effect of federalizing all racially-motivated state law torts that implicate "the security of persons and property."

839 F. Supp. at 1019 (quoting *Mahone v. Waddle*, 564 F.2d at 1029).

The Court has repeatedly cautioned against interpreting Section 1981 and other early civil rights statutes to create a general federal tort law. In *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989), the Court stated: "Although we must do so when Congress plainly directs, as a rule we should be and are 'reluctant to federalize' matters traditionally covered by state common law." Similarly, in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), the Court, in construing 42 U.S.C. § 1985(3), cautioned against interpreting civil rights statutes to create "a general federal tort law." More recently, the Court recognized "the constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). While concurring in the same case, Justice Kennedy observed: "As all recognize, essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step in interpreting § 1985(3) risks making a whole category of ordinary state crimes a concurrent violation of a single Congressional statute passed more than a century ago." 506 U.S. at 287.

In the en banc opinion below, Judge Martin addressed this concern by noting that "[t]he 'security of persons and

property' language limits the potential class of cases that may be brought under equal benefit protection." 319 F.3d at 832. Pet. App. 12. Judge Martin also noted that "to prevail on a Section 1981 claim, a litigant must prove intentional discrimination on the basis of race, which involves a high threshold of proof." 319 F.3d at 832-33. *Id.*

However, as Judge Suhrheinrich pointed out in his dissenting opinion, the fact that the "full and equal benefit" clause applies only to "laws and proceedings for the security of persons and property" is scarcely a limitation on the types of claims that may be brought under that clause. The entire law of torts is concerned with "the security of persons and property." 319 F.3d at 842. Pet. App. 32. Judge Suhrheinrich noted that "under the majority's interpretation, the equal benefit clause can conceivably be applied to every garden-variety state tort law claim where the parties are of different races." 319 F.3d at 842. Pet. App. 33.

Moreover, the fact that a plaintiff bringing claims under the "full and equal benefit" clause may not ultimately "prevail," as Judge Martin suggests, does not negate the time and effort federal courts will need to expend in deciding those claims. Pet. App. 12. Indeed, merely examining some of the cases analyzing the "full and equal benefit" clause suggests that expanding that clause to encompass claims of private discrimination will both risk creating a general federal tort law and cause hundreds of additional claims to be made in the federal courts.

In *Brown v. Philip Morris,* black smokers attempted to premise a claim under the full and equal benefit clause, alleging that tobacco companies had marketed more

dangerous menthol cigarettes in black neighborhoods. In *Adams v. Boy Scouts of America,* black children and their parents brought claims alleging that they were subjected to inadequate supervision and racism at a Boy Scout camp. In *Phillip v. University of Rochester,* black students sued under the "full and equal benefit" clause after being asked by a security guard to leave a university library lobby. In *Muick v. Wicks,* an inmate brought a claim alleging that an altercation in the prison had been racially motivated. Most of these claims were dismissed. But their very breadth suggests that if the state action limitation is removed, a wide variety of actions alleging violations of the "full and equal benefit" clause will appear in federal court.

Further, the "full and equal benefit" clause provides no concrete guidance on what was meant by "security of persons and property" in twenty-first century America. Courts would be required to look to state common and statutory law for assistance and create their own standards with no uniform principles to apply.[6] Without clear standards, juries also would have little guidance in deciding what conduct constituted an actionable "deprivation" of the clause. But, unlike in the Reconstruction Era, there is little justification for such potentially duplicative claims when other state remedies are available with better

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[6] Significantly, Chapman maintained she was denied the benefit of her Fourth Amendment right to be free of unreasonable searches, her Fifth Amendment right "not to be deprived of life, liberty, or property, without due process of law" and Ohio Revised Code Section 2935.041, relating to a merchant's right to detain suspected shoplifters. (Chapman's memorandum in opposition to motion for summary judgment at 11-12.)

defined standards. And minor assaults or disputes between persons of different races would end up in the federal courts which are already overburdened.

Courts have not yet dealt with the vagueness of the statutory language by providing any clear standards on how the "full and equal benefit" clause is to be applied. The majority in *Chapman* merely repeated the language of the statute, noting that "[t]he equal benefit clause may only be invoked when one party denies another the 'full and equal benefit of all laws and proceedings *for the security of persons and property* as is enjoyed by white citizens.'" 319 F.3d at 832 (emphasis in original). Pet. App. 12. Similarly, the Second Circuit in *Phillip* noted that claimants under the "full and equal benefit" clause "must identify a relevant law or proceeding for the 'security of persons and property.'" 316 F.3d at 298. However, the Second Circuit did not "attempt to define the universe of laws and proceedings for the security of persons and property, believing this task best resolved case by case." 316 F.3d at 298. Indeed, it limited its holding to the facts of the case. 316 F.3d at 298. The Court should grant this petition to ensure that state law claims are not needlessly federalized and to provide a concrete standard for courts asked to consider the variety of potential claims under the "full and equal benefit" clause.

C. Interpreting The "Full and Equal Benefit" Clause Of Section 1981 As Applying To Private Action Misreads The Legislative History And Leads To Internal Inconsistencies In The Statute

Courts that have concluded that Section 1981 applies to private actors have placed primary reliance on the

amendment to the statute enacted in 1991.[7] These courts misread the legislative history surrounding the 1991 amendment and offer an interpretation of Section 1981 that results in internal inconsistencies.

In 1991, Congress amended Section 1981 by adding sections (b) and (c) to that venerable statute:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by non-governmental discrimination and discrimination under color of State law.

The Sixth Circuit stated that "Section 1981 is unambiguous. According to subsection (c), the rights protected by section 1981 are 'protected against impairment by nongovernmental discrimination.'" 319 F.3d at 829-30. Pet. App. 6. The Second Circuit in *Philip* also stated that "the 1991 amendment removes any doubt that the conduct of private actors is actionable under the equal benefit clause of Section 1981." 316 F.3d at 296.

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[7] The legislative history of Section 1981 itself reveals that in 1866 "Congress intended to protect a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966). The portions of the bill which contained a general prohibition against discrimination were deleted in the House in order to secure passage. *Id. See Cong. Globe*, 39th Cong. 1st Sess., 1366 (1866) ("[S]ome gentlemen were apprehensive that the words we propose to strike might give warrant to a latitudinarian construction not intended.").

The 1991 amendment does not lead to the conclusion reached by the Sixth and Second Circuits. Reading Section 1981(c) as expanding the "full and equal benefit" clause to reach private actors is undercut by the legislative history of Section 1981(c). Adopting the view that the "full and equal benefit" clause applies to private actors would lead to textual inconsistencies and the absurd result of federalizing tort law, plus contravene the intent of Congress in amending the statute in 1991. *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("Absurd results are to be avoided and internal inconsistencies in the statute must be dealt with"); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) ("This Court, in interpreting the words of a statute, has some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute. . . .").

The House Judiciary Committee Report on the Civil Rights Act of 1991 states that "[t]his subsection is intended to codify *Runyon v. McCrary*. In *Runyon*, the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. The Committee intends to prohibit racial discrimination in all contracts, both public and private." H.R. Rep. No. 102-40(II) 102d Cong., 1st Sess. 37 (1991), reprinted in 1991 U.S.C.C.A.N. 593, 731. A report by the House Committee on Education and Labor is similar, stating that Section 1981(c) "confirms Section 1981's coverage of both public and private sector *employment*." H.R. Rep. No. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 547, 630. (Emphasis added.)

The Court's decision in *Runyon* was indeed limited to the "make and enforce contracts" clause, and there is no

discussion in *Runyon* of the "full and equal benefit" clause. In view of this unambiguous legislative history, several lower courts have now held that Section 1981(c) was intended solely to codify *Runyon* and to prohibit discrimination in private, as well as public, contracting. *See, e.g., Dennis v. County of Fairfax*, 55 F.3d 151, 156, n.1 (4th Cir. 1995) ("[S]ubsection (c) did not purport to overrule *Jett's* holding with respect to municipal liability but only to codify *Runyon v. McCrary*"); *Ebrahimi v. City of Huntsville Bd. of Educ.*, 905 F. Supp. 993, 995 n.2 (N.D. Ala. 1995), *appeal dismissed and remanded on other grounds*, 114 F.3d 162 (11th Cir. 1997); *Philippeaux v. North Cent. Bronx Hosp.*, 871 F. Supp. 640, 655 (S.D.N.Y. 1994) ("The legislative history . . . mentions subsection (c) only briefly, and states that subsection (c) was added to reaffirm *Runyon v. McCrary*."). Indeed, the Court has recognized that "§ 101 . . . amended the 1866 Civil Rights Act's prohibitions of racial discrimination in 'mak[ing] and enforce[ment] [of] contracts . . . in response to *Patterson v. McLean Credit Union.*" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994). *See also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 n.2 and 306 n.6 (1994). Prior to *Patterson*, all courts of appeals to have considered the issue, and almost all district courts to have considered the issue, had concluded the "full and equal benefit" clause did not apply to private actors.

Moreover, the title of the Civil Rights Act of 1991 is "Restoring Prohibition Against All Racial Discrimination *in the Making and Enforcement of Contracts*" H.R. Rep. No. 102-40(II), at 35 (emphasis added). This is yet another indication that Congress merely intended to codify *Runyon v. McCrary* in adding subsection (c) to Section 1981. *See I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502

U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text").

Interpreting Section 1981(a) as applying in every instance to both private and state actors also creates interpretive difficulties, even if one assumes that both private and state actors could deprive persons of the "full and equal benefit of all laws and proceedings." That is because Section 1981(a) also provides that all persons "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other." No court has held that this language applies to private actors. Even Judge Moore conceded in her dissent in the panel decision that at least portions of this clause "may indeed refer primarily to state action." 256 F.3d at 438, n.1. Pet. App. 78. If portions of Section 1981(a) do indeed "refer primarily to state action," it is simply not possible to read Section 1981(c) as the Sixth Circuit and the Second Circuit insist it must be read – as protecting *all* rights mentioned in Section 1981(a) against private as well as public discrimination.

Finally, Section (c) is ambiguous; it does not define which "rights" it covers, nor does it indicate whether it refers back to subsection (a) or subsection (b) of the amended Section 1981. And the literal language of Section 1981 – which became Section 1981(a) after the 1991 amendment – appears to include as a "right" only the "right . . . to make and enforce contracts," "to sue," "be parties," and "give evidence." Indeed, the Court had *not* included the "full and equal benefit" clause in its enumeration of the "rights" protected by Section 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 (1989).

In *Patterson*, 491 U.S. at 178, the Court, citing Justice White's dissent in *Runyon*, stated that "one cannot seriously contend that the grant of the other rights in Section 1981 [that is, other than the right to 'make' contracts], i.e., the rights to 'sue, be parties, give evidence,' and '*enforce* contracts' accomplishes anything other than the removal of *legal* disabilities to sue, be a party, testify, or enforce a contract. Indeed, it is impossible to give such language any other meaning." (Emphasis in original). *See also Runyon v. McCrary*, 427 U.S. at 195, n.5 (White, J., dissenting). Thus, it is not even clear that the "full and equal benefit clause" is one of the "rights" protected by Section 1981(a), much less one of the "rights" covered by Section 1981(c).

Thus, neither the plain language of Section 1981(c) nor its legislative history supports the claim that Congress erased existing precedent in 1991 and created a cause of action against private actors for violations of the "full and equal benefit" clause. The Sixth Circuit's decision was based on a misreading of Section 1981 and its legislative history.[8] The Court should grant this petition in order to

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[8] The construction of Section 1985(3) found in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), does not support the Sixth Circuit's reading of the "full and equal benefit clause" of Section 1981. The literal language of Section 1985(3) expressly contemplates private action, since it provides a cause of action where "two or more persons in any State . . . conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." No similar language is found in Section 1981. Indeed, other courts have observed that the perplexing structure of Section 1985(3) limits its usefulness as a model in construing other statutes. *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988) (noting that "[t]his statute addresses private acts – going 'in disguise on the highway' is a reference to the M.O. of the Klu Klux Klan

(Continued on following page)

correct this misreading of Section 1981 and to create a uniform standard as to the meaning of the "full and equal benefit" clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN B. LEWIS
Counsel of Record
THOMAS J. PIATAK
GREGORY V. MERSOL
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200
Counsel for Petitioner

– yet condemns only deeds that 'deprive' the victim of the 'equal protection of the laws, or of equal privileges and immunities under the laws,' something within the domain of government exclusively. This admixture of private and public action has befuddled courts ever since.").

319 F.3d 825

Lynette CHAPMAN, Plaintiff-Appellant,

v.

The HIGBEE COMPANY, d/b/a Dillard Department Stores, Inc., Defendant-Appellee.

No. 99-3970.

United States Court of Appeals,
Sixth Circuit.

Argued March 20, 2002.

Decided and Filed Feb. 11, 2003.

David R. Grant (argued and briefed), Smith & Condeni, Cleveland, OH, for Plaintiff-Appellant.

Gregory E. O'Brien, Timothy D. Johnson, Weston, Hurd, Fallon, Paisley & Howley, Cleveland, OH, John B. Lewis (argued and briefed), Thomas J. Piatak (briefed), Baker & Hostetler, Cleveland, OH, for Defendant-Appellee.

Gino J. Scarselli (briefed), Richmond Heights, OH, for Amicus Curiae American Civil Liberties Union.

Michael W. Donaldson (briefed), Thomas M. Tarpy (briefed), Michael R. Thomas, Vorys, Sater, Seymour & Pease, Columbus, OH, for Amici Curiae Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., Michigan Retailers Association and Tennessee Council of Retail Merchants.

Before MARTIN, Chief Circuit Judge; BOGGS, SUHRHEINRICH, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

MARTIN, C.J., delivered the opinion of the court, in which DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. SUHRHEINRICH, J., delivered a separate dissenting opinion, in which BOGGS and BATCHELDER, JJ., joined.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge.

Lynette Chapman brought suit against the Higbee Company, doing business as Dillard's Department Store, after a Dillard's security officer stopped and searched her. Chapman alleges that the stop and search were racially motivated and violated her right to the "full and equal benefit of the law" under 42 U.S.C. § 1981 and her right to be free from unreasonable search and seizure under the Fourth Amendment. Her claim raises two issues on appeal: (1) whether section 1981 provides a cause of action against a private party under its equal benefit clause and (2) whether the Dillard's security officer acted "under color of law." The court below found that section 1981 does not protect against private impairment of its equal benefit clause and that the security officer did not act "under color of law." A divided panel of this court affirmed. After rehearing *en banc,* we REVERSE.

I.

On February 20, 1997, Chapman, an African-American, was shopping at Dillard's Department Store in

Cleveland, Ohio. After choosing some clothing, Chapman entered a fitting room, from which a Caucasian woman had just exited. When Chapman entered the fitting room, she noticed a sensor tag called a "kno-go" on the floor. After trying on the clothing, Chapman decided not to purchase anything and left the fitting room to return the clothing to the racks.

A Dillard's sales assistant noticed the sensor on the floor of Chapman's fitting room and, suspecting Chapman of shoplifting, notified a Dillard's security officer. The officer, an off-duty sheriff's deputy, was wearing his official sheriff's department uniform, badge, and sidearm. As an employee of Dillard's, the security officer was obligated to obey Dillard's Rules and Procedures for Security Personnel, which provide the following instructions with respect to strip searching customers suspected of shoplifting: "Strip searches are prohibited. If you suspect that stolen objects are hidden on [the shopper's] person, call the police."

The security officer stopped Chapman and directed her back to the fitting room. He and a female manager then searched Chapman's purse. After determining Chapman's purse contained no Dillard's merchandise, the officer informed Chapman that it would also be necessary to check her clothes. At the officer's behest, Chapman accompanied the female manager into the fitting room. The manager then searched Chapman by having Chapman remove her coat and suit jacket and lift up her shirt. After the manager found nothing, she apologized, and Chapman left the store.

As a result of this incident, Chapman brought suit against Dillard's, seeking relief (1) under 42 U.S.C. § 1981

for impairment of her rights under that statute's equal benefit clause and (2) under 42 U.S.C. § 1983 for violations of her right to be free from unreasonable search and seizure under the Fourth Amendment and her right to due process under the Fifth Amendment. A magistrate judge, sitting by the parties' consent, granted summary judgment in favor of Dillard's, finding (1) Chapman could not state a cognizable claim under section 1981 because the statute does not protect against private impairment of its equal benefit clause and (2) Chapman could not state a cognizable claim under section 1983 because the security officer was not acting "under color of state law." After the magistrate denied her motion for reconsideration, Chapman appealed. A divided panel of this court affirmed, and we granted *en banc* review.

II.

We review *de novo* a district court's grant of summary judgment, viewing the evidence in the light most favorable to the non-moving party. *Grand Rapids Plastics, Inc. v. Lakian,* 188 F.3d 401, 405 (6th Cir.1999). Summary judgment is appropriate only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. fed.R.Civ.P. 56(c); *see also Aparicio v. Norfolk & Western Ry. Co.,* 84 F.3d 803, 807 (6th Cir.1996) ("Without weighing the evidence or judging the credibility of witnesses, and drawing all inferences in favor of the non-moving party, a district court usually undertakes to determine whether there is sufficient evidence to permit reasonable jurors to find for the non-moving party.").

A.

The viability of Chapman's section 1981 claim turns on whether section 1981 protects against private impairment of its equal benefit clause. In relevant part, section 1981 reads as follows:

> (a) Statement of equal rights
>
> *All persons within the jurisdiction of the United States shall have the same right in every State and Territory* to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> * * * *
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.[1]

42 U.S.C. § 1981(a), (c) (1998) (emphasis added).

"In all cases of statutory construction, the starting point is the language employed by Congress." *Appleton v.*

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[1] In 1991, Congress amended 42 U.S.C. § 1981 by the addition, *inter alia,* of subsection (c), "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." H.R.Rep. No. 102-40(II), at 1, *reprinted in* 1991 U.S.C.C.A.N. at 694.

First Nat'l Bank of Ohio, 62 F.3d 791, 801 (6th Cir.1995). Moreover, where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (citation and internal punctuation omitted).

Section 1981 is unambiguous. According to subsection (c), the rights protected by section 1981 are "protected against impairment by nongovernmental discrimination." Section 1981 explicitly protects the right "to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens;" therefore, that right is "protected against impairment by nongovernmental discrimination."

1.

Dillard's argues that subsection (c)'s protection against nongovernmental discrimination is limited to subsection (a)'s make and enforce contracts provision.

Because subsection (c) already expressly limits its reach to those rights "protected by this section," the principle of *expressio unius est exclusio alterius* would seem to preclude this court from grafting additional limitations into the statute.

We may, however, look past the plain language of a statute where: (1) the plain language creates inconsistencies within the statute itself, (2) application of the plain language runs contrary to clearly expressed legislative intent, or (3) application of the plain language would lead to absurd results. *Vergos v. Gregg's Enterprises, Inc.,* 159 F.3d 989, 990 (6th Cir.1998) (citing *United States v.*

Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)); *see also Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643, 98 S.Ct. 2053, 56 L.Ed.2d 591 (1978) ("This Court, in interpreting the words of a statute, has some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results or would thwart the obvious purpose of the statute but it is otherwise where no such consequences would follow and where [a literal reading] appears to be consonant with the purposes of the Act.") (quoting *Commissioner v. Brown,* 380 U.S. 563, 571, 85 S.Ct. 1162, 14 L.Ed.2d 75 (1965) (internal citation and punctuation omitted)); *Crooks v. Harrelson,* 282 U.S. 55, 59 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930).

2.

Relying on a Third Circuit decision authored before Congress added the language in subsection (c), *Mahone v. Waddle,* 564 F.2d 1018 (3d Cir.1977), Dillard's suggests that a plain reading of subsection (c) creates internal inconsistencies. In *Mahone,* the court held that a complaint against a city government for violation of section 1981's equal benefit clause stated a cognizable cause of action. Responding in dicta to the city's contention that the court's broad construction of section 1981 would give rise to a federal cause of action for every racially motivated private tort, the *Mahone* court suggested that such a result was unlikely, because "the concept of state action is implicit in the equal benefit clause." *Id.* at 1029-30. Adopting the *Mahone* court's dicta, Dillard's argues that a plain

reading of subsection (c) is inconsistent with section 1981's equal benefit clause, which implicitly incorporates the concept of state action.[2]

The Supreme Court's decision in *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), however, precludes this court from finding subsection (c)'s plain language inconsistent with the statute's equal benefit provision. In *Griffin,* the Court found 42 U.S.C. § 1985(3)'s analogous equal protection provision applicable to private as well as official action. *Id.* at 96-102, 91 S.Ct. 1790; *see also* 42 U.S.C. § 1985(3) (providing a cause of action where "two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and

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[2] Phrased differently, Dillard's argues that a plain reading of subsection (c) renders the statute internally inconsistent by protecting against private impairment rights that private actors cannot impair. Although not germane to Chapman's claim under section 1981's equal benefit clause, one could make a similar argument on the basis of subsection (a)'s like punishment clause. *See* 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States . . . shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

There is nothing unworkable, however, about the proposition that a given statute may proscribe conduct beyond that which all of those persons the statute regulates are actually capable of engaging in. That the driver of an industrial dump-truck may be incapable of violating a seventy-five miles-per-hour speed limit does not preclude uniform application of that limit. Indeed, if a necessary component of statutory consistency was a regulated group capable of violating all of a statute's proscriptions, section 1981 could not be consistently read to apply to state actors, the vast majority of whom are in no position to punish, tax, or deny licenses to any person protected by section 1981.

immunities under the laws"). In so finding, the *Griffin* Court expressly rejected the notion that the concept of state action is implicit in an equal protection provision: "A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet *there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.*" *Id.* at 97, 91 S.Ct. 1790 (emphasis added).

Indeed, *Griffin's* interpretation of section 1985(3)'s equal protection provision suggests that section 1981's analogous clause would protect against private impairment even absent subsection (c)'s explicit instruction: "[T]he failure to mention any such [state action] requisite can be viewed as an important indication of congressional intent to speak in section 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' *whatever their source.*" *Griffin,* 403 U.S. at 97, 91 S.Ct. 1790 (emphasis added); *see also United States v. Williams,* 341 U.S. 70, 76, 71 S.Ct. 581, 95 L.Ed. 758 (1951) (plurality opinion of Frankfurter, J.) (finding no state action requirement in analogous equal protection provision of criminal statute); *United States v. Harris,* 106 U.S. 629, 637-39, 1 S.Ct. 601, 27 L.Ed. 290 (1883) (same).

Given the Supreme Court's rejection of the notion that state action is implicit in the concept of equal protection,

we cannot find the plain language of subsection (c) inconsistent with the statute's equal benefit clause.[3]

3.

There is nothing in the legislative history of the 1991 amendments to section 1981 that prevents this court from applying subsection (c)'s plain language. Of the two House Committee Reports on the Civil Rights Act of 1991, only one even mentions subsection (c), and that discussion is terse. The House Judiciary Committee authored H.R. Report No. 102-40(II), which states only that Congress intended to codify *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), and intended subsection (c) "to prohibit racial discrimination in all contracts, both public and private." H.R.Rep. No. 102-40(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731. Congress's failure to discuss the application of subsection (c) to the other rights enumerated in subsection (a) does not properly give rise to an inference that subsection (c)'s reference to "the rights in this section" actually refers to "the contractual rights in this section." Congress's failure to comment upon statutory language simply does not constitute a rejection of the plain import of that language. Even viewed in the light most favorable to Dillard's, the

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[3] The differences in groups regulated by section 1985(3) – groups of two or more persons – and section 1981 – either individuals or groups – in no way affects whether the concept of state action is implicit in the statutes' analogous equal protection provisions. *See Griffin,* 403 U.S. at 98-99, 91 S.Ct. 1790 (rejecting the argument that section 1985(3) contemplated "a private conspiracy so massive and effective that it supplants those [state] authorities and thus satisfies the state action requirement").

legislative history of subsection (c) is equivocal. Thus, we cannot say that giving effect to subsection (c)'s plain language flouts Congress's clear intent in passing the 1991 Amendment.

4.

Dillard's also argues that application of subsection (c)'s plain language with respect to section 1981's equal benefit clause would have the "absurd" result of federalizing state tort law.

A result, however, is not absurd merely because it does not comport with one's notion of what constitutes good policy.[4] We typically embark upon the exceptional task of divining Congress's intent outside the literal language of the statute only when the statute produces a result not which we dislike but which is patently illogical or contrary to Congress's intent. *See Crooks,* 282 U.S. at 59-60, 51 S.Ct. 49 ("[T]o justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail.").

As discussed above, the legislative history of subsection (c) is at most equivocal. There is nothing in that history evidencing Congress's intent that a plain reading

[4] Of course, "we should be and are 'reluctant to federalize' matters traditionally covered by state common law." *Patterson v. McLean Credit Union,* 491 U.S. 164, 183, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (internal quotation omitted). This reluctance, however, does not give this court leeway to ignore Congress's plain instructions.

of subsection (c) not prevail. Moreover, it is unlikely that application of subsection (c)'s plain language will unleash the flood of cases Dillard's predicts. The language surrounding the "full and equal benefit" clause serves to cabin both the number and nature of claims that may be brought under its ambit. The equal benefit clause may only be invoked when one party denies another the "full and equal benefit of all laws and proceedings *for the security of persons and property* as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (emphasis added). The "security of persons and property" language limits the potential class of cases that may be brought under the equal benefit provision. A litigant must demonstrate the denial of the benefit of a law or proceeding protecting his or her personal security or a cognizable property right.[5] Further, to prevail on a section 1981 claim, a litigant must prove intentional discrimination on the basis of race, which involves a high threshold of proof. Because of these significant limitations, we do not believe that the plain language of subsection (c) federalizes a wide swath of conduct traditionally covered by state common law.

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[5] Several cases that have allowed "full and equal benefit" claims to go forward without state action have involved serious threats to a person's security in the form of physical violence. See, e.g., *Carey v. Rudeseal,* 703 F.Supp. 929, 930 n. 1 (N.D.Ga.1988) (noting that court had allowed "full and equal benefit" claim against private actor involved in Ku Klux Klan incident because section 1981 "provides a cause of action against private individuals for racially-motivated, intentionally-inflicted injury and does not require state action in the deprivation of rights"); *Hawk v. Perillo,* 642 F.Supp. 380, 386-87, 390 (N.D.Ill.1986) (construing language and history of statute to allow claim against private individual who engaged in vicious beating of plaintiffs motivated by racial animus).

Because section 1981 plainly protects against impairment of its equal benefit clause by private discrimination and because there is no reason to look beyond section 1981's plain language, we find that Chapman states a cognizable section 1981 claim.[6]

B.

In addition to her section 1981 claim, Chapman seeks relief under 42 U.S.C. § 1983 for violations of her right to be free from unreasonable searches and seizures under the Fourth Amendment and her due process rights under the Fifth Amendment.[7] To state a claim under section 1983, Chapman must show that Dillard's, through its security officer, deprived her of a right secured by the Constitution or laws of the United States while acting "under color of state law." *See Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir.1992).

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[6] In so deciding today, we agree with the Second Circuit's recent decision in *Phillip v. University of Rochester,* 316 F.3d 291 (2d Cir.2003). Two sister circuits, in *Brown v. Philip Morris, Inc.,* 250 F.3d 789 (3d Cir.2001), and *Youngblood v. Hy-Vee Food Stores, Inc.,* 266 F.3d 851 (8th Cir.2001), disagree with us, relying on our withdrawn panel decision in this case, on various district court decisions, and on dicta in *Mahone.*

[7] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction therof [sic] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1998).

A private party's actions constitute state action under section 1983 where those actions may be "fairly attributable to the state." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 947, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test. *See Wolotsky,* 960 F.2d at 1335.[8] On appeal, Chapman argues that summary judgment should have been denied because there was a genuine issue of material fact regarding the existence of state action under either the public function test or the nexus test.

1.

Under the public function test, a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state. The public function test has been interpreted narrowly. Only functions like holding elections, *see Flagg Bros. v. Brooks,* 436 U.S. 149, 157-58, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), exercising eminent domain, *see Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 352-53, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), and operating a company-owned town, *see Marsh v. Alabama,* 326 U.S. 501, 505-09, 66 S.Ct. 276, 90

[8] Citing *West v. Atkins,* 487 U.S. 42, 49-50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (public function test); *Flagg Bros. v. Brooks,* 436 U.S. 149, 157, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (same); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 170, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (state compulsion test); *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 721-26, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) (symbiotic relationship test).

L.Ed. 265 (1946), fall under this category of state action. Our sister circuits have consistently held that the mere fact that the performance of private security functions may entail the investigation of a crime does not transform the actions of a private security officer into state action. *See Wade v. Byles,* 83 F.3d 902, 905 (7th Cir.1996); *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442, 1457 (10th Cir.1995); *White v. Scrivner Corp.,* 594 F.2d 140, 142-43 (5th Cir.1979).

In *White,* for example, the Fifth Circuit held that the detention of a suspected shoplifter is not an exclusive state function.

> A merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. Experience teaches that the prime responsibility for protection of personal property remains with the individual. A storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism. Such action cannot logically be attributed to the state.

594 F.2d at 142 (citation omitted). Applying these principles to Chapman's claim, we are satisfied that the Dillard's security officer was not performing a function exclusively reserved to the State when he stopped and searched Chapman. Under the public function test, there was no state action.

2.

Under the symbiotic or nexus test, a section 1983 claimant must demonstrate that there is a sufficiently

close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself. *See Wolotsky,* 960 F.2d at 1335; *see also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (noting that a challenged activity may be state action "when it is entwined with governmental policies or when government is entwined in [its] management or control.") (internal quotation omitted); *Layne v. Sampley,* 627 F.2d 12, 13 (6th Cir.1980) (holding that officer who shot plaintiff while officer was off-duty acted under color of state law because officer's authority to carry weapon derived from his status as police officer, conflict between officer and plaintiff arose out of officer's official duties, and plaintiff threatened officer in officer's official capacity); *Stengel v. Belcher,* 522 F.2d 438, 441 (6th Cir.1975) (concluding that off-duty police officer who shot and killed two men and paralyzed a third in a barroom brawl acted under color of law because mace spray used by officer was issued by police department, and officer carried his pistol and intervened in dispute pursuant to department regulations).

The inquiry is fact-specific, and the presence of state action is determined on a case-by-case basis. *See Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Although "it is possible to determine . . . whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Layne,* 627 F.2d at 13 (internal citations and quotations omitted).

Here, the Dillard's security officer who stopped and searched Chapman was an off-duty sheriff's deputy,

wearing his official sheriff's department uniform, badge, and sidearm. Moreover, the Dillard's security officer was obligated to obey Dillard's policies and regulations while on-duty at the store. Although the state played no part in the promulgation of these policies, their strip searching provision directly implicates the state: "Strip searches are prohibited. If you suspect that stolen objects are hidden on [the shopper's] person, call the police."

During the incident at issue, the Dillard's security officer did not represent himself as a police officer, threaten to arrest Chapman, wave his badge or weapon, or establish any contact with the sheriff's department. He did however initiate a strip search by requiring Chapman to enter a fitting room with the sales manager to inspect her clothing.[9] Because Dillard's policy *mandates* police intervention in strip search situations, a reasonable jury could very well find that the initiation of a strip search by an armed, uniformed sheriff's deputy constituted an act that may fairly be attributed to the state. Additionally, if Chapman did not feel free to leave, as a result of the security officer's sheriff's uniform, his badge, or his sidearm, a reasonable jury could find the detention was a tacit arrest and fairly attributable to the state.

Therefore, we find that there is a genuine issue of material fact as to whether the security officer acted under "color of state law" when he asked Chapman to enter the

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[9] Dillard's policy does not define strip searching. Because Chapman was forced to remove her clothing (i.e., she was forced to remove her coat and suit jacket, and lift up her shirt), a jury could reasonably determine that she was strip searched under the Dillard's policy.

fitting room with the sales manager so that Chapman's clothes and person could be searched.

III.

For the foregoing reasons, we REVERSE and REMAND for further proceedings consistent with this opinion.

SUHRHEINRICH, Circuit Judge, dissenting.

I.

If there is a first principle among canons of statutory interpretation, it is that a statute is to be enforced according to the plain meaning of its terms. *See United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *Vergos v. Gregg's Enters. Inc.,* 159 F.3d 989, 990 (6th Cir.1998). To some extent, though, the plain meaning rule is a tautology: "Words should be read as saying what they say." *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 229 (Little, Brown & Co.1975). In other words, "[t]he rule tells us to respect meaning but it does so without disclosing what the specific meaning is." *Id.* Thus, as one commentator has observed:

> At best, [the plain meaning rule] reaffirms the preeminence of the statute over materials extrinsic to it. In its negative aspect, on the other hand, the rule has sometimes been used to read ineptly expressed language out of its proper context, in violation of established principles of meaning and communication. To this extent it is an impediment to interpretation.

Id.

Like most rules in law, however, this bedrock principle of statutory construction is qualified, as reflected in an early invocation of the doctrine:

> If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

Lake County v. Rollins, 130 U.S. 662, 670, 9 S.Ct. 651, 32 L.Ed. 1060 (1889). In other words, the plain meaning command of literalness is nonetheless subject to both internal and external context. DICKERSON, *supra,* at 230 (stating that the plain meaning rule does "[n]ot quite" demand literalness, "because internal context is not excluded and external context may be taken into account to the extent of weighing the chances of absurdity").

The majority acknowledges that the "plain language" rule is subject to exceptions. *See Maj. Op.* at 829-30. It sees no need to resort to those exceptions, however, because it finds that § 1981 is unambiguous in that subsection (c) states that the rights protected by this section are "protected against impairment by nongovernmental discrimination," and one of the rights enumerated in subsection (a) "explicitly protects the right 'to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.'" From this the majority infers that this right is "'protected against impairment by nongovernmental discrimination.'" *Id.* Because I believe that such a literal interpretation of the statute creates internal inconsistencies, is inconsistent with the legislative history, and leads to absurd results,

see Vergos, 159 F.3d at 990 (listing situations when courts may look beyond language of the statute), I **DISSENT**.

II.

A.

"In all cases of statutory construction, the starting point is the language employed by Congress." *Vergos,* 159 F.3d 989, 990 (6th Cir.1998) (internal quotations marks omitted). Section 1981, as amended in 1991, reads as follows:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C.A. § 1981 (West 1994) (emphasis added). Congress amended § 1981 in 1991 by adding subsections (b) and (c) and designating the original section as subsection (a). Pub.L. 102-166, § 101, 105 Stat. 1071 (1991).

1.

Chapman's argument hinges on subsection (c). I do not disagree that subsection (c), standing alone, plainly states "[t]he *rights* protected by this section are protected against impairment by nongovernmental discrimination." Read in isolation, subsection (c) is unambiguous. But subsection (c) requires one to look elsewhere – presumably subsection (a) – to determine *which* "rights" are protected from nongovernmental discrimination. *Cf.* LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 74-75 (Longman 6th ed. 2002) ("Even when words in isolation do seem unambiguous, the process of coordinating them with the facts of a particular case may make them unclear.").

The rights in subsection (a) are not all of the same ilk, however; some protect against infractions that may be committed by both public and private actors and some protect against conduct that necessarily invokes any state action. For example, both private and public beings may enter into contracts. In fact, "[i]t is usually with another individual, not the state, that a black person would seek to make a contract; it is that other individual's racially motivated refusal to make a contract which can cause harm to the black person." *Mahone v. Waddle,* 564 F.2d 1018, 1029 (3d Cir.1977) (dicta). Thus, subsection (c) may logically apply to the contract clause of (a).

Yet it cannot so easily be said that subsection (c) applies to the equal benefit clause of (a). As aptly stated by the Third Circuit:

> The words "full and equal benefit of all *laws* and *proceedings* for the security of persons and property" (emphasis supplied), on the other hand, suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Id. at 1029 (dicta).

Every court of appeals that has considered this issue, both prior and subsequent to the 1991 amendment, has shared the *Mahone* court's view. *See Youngblood v. Hy-Vee Food Stores, Inc.,* 266 F.3d 851, 855 (8th Cir.2001) (stating that "[b]ecause the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law"; internal quotation omitted, citing, *inter alia, Mahone*), *cert. denied,* 535 U.S. 1017, 122 S.Ct. 1606, 152 L.Ed.2d 621 (2002); *Adams ex rel. Harris v. Boy Scouts of Am.-Chickasaw Council,* 271 F.3d 769, 777 (8th Cir.2001) (same, citing *Youngblood* and *Mahone*); *Brown v. Philip Morris Inc.,* 250 F.3d 789, 799 (3d Cir.2001) (dicta) (stating that "even if [sic] were to consider them, such 'full and equal benefit' claims would fail in light of a substantial line of authority holding that only state actors can be sued under the 'full and equal benefit' clause of Section 1981"; citing *Mahone*); *Shaare Tefila Congregation v. Cobb,* 785

F.2d 523, 525-26 (4th Cir.1986) (holding that it agreed "with the Third Circuit's interpretation of the 'full and equal benefit' clause ... and conclude [sic] that state action is required in order to assert a claim under that statute"; citing *Mahone*), *rev'd in part on other grounds,* 481 U.S. 615, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987). Similarly, a number of other courts that have considered the issue, both before and after the 1991 amendment, have followed the reasoning of *Mahone. See, e.g., Muick v. Wicks,* No. 3:01-CV-0130-M, 2001 WL 1006059, at 4 (N.D.Tex. July 24, 2001) ("absent state action, Plaintiff's Section 1981 claim [under the full and equal benefit clause] is untenable and as a result, it is frivolous"); *Sterling v. Kazmierczak,* 983 F.Supp. 1186, 1192 (N.D.Ill.1997); *Lewis v. J.C. Penney Co.,* 948 F.Supp. 367, 371 (D.Del.1996); *Spencer v. Casavilla,* 839 F.Supp. 1014, 1018 (S.D.N.Y.1993) ("Most of the decisions ... have held that state action is required to state a claim under the 'equal benefit' and 'like punishment' clauses of § 1981."); *Brooks v. ABC, Inc.,* 737 F.Supp. 431, 440 (N.D.Ohio 1990), *vacated in part on other grounds,* 932 F.2d 495 (6th Cir.1991); *Rochon v. Dillon,* 713 F.Supp. 1167, 1172 (N.D.Ill.1989); *Thompson v. Wise General Hosp.,* 707 F.Supp. 849, 853 (W.D.Va.1989), *aff'd,* 896 F.2d 547 (4th Cir.1990); *Provisional Gov't of Republic of New Afrika v. ABC, Inc.,* 609 F.Supp. 104, 109 (D.D.C.1985); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.,* 569 F.Supp. 1344, 1353 (E.D.Va.1983), *aff'd,* 742 F.2d 1448 (4th Cir.1984); *Williams v. Northfield Mount Hermon Sch.,* 504 F.Supp. 1319, 1332 (D.Mass.1981). *But see Franceschi v. Hyatt Corp.,* 782 F.Supp. 712, 724 (D.P.R.1992) (allowing a cause of action under the equal benefit clause against a private hotel for denial of accommodation based on race); *Carey v. Rudeseal,* 703 F.Supp. 929, 930 n. 1 (N.D.Ga.1988) (permitting a cause of action under the equal benefit clause

against members of the Ku Klux Klan for assault); *Hawk v. Perillo,* 642 F.Supp. 380, 392 (N.D.Ill.1985) (allowing a cause of action under the equal benefit clause against police officers who beat minority victims).

As the *Mahone* court's comments make clear, a plain reading of subsection (c) is inconsistent with § 1981's equal benefit clause, which implicitly incorporates the concept of state action. Only the state can prescribe laws, and only the state can deprive an individual of the benefit of those laws. An act by a private individual which violates the legal rights of another is not the equivalent of a deprivation of the full and equal benefit of the law violated. Stated differently, an individual is only deprived of the full and equal benefit of all laws and proceedings if he or she is impaired or prevented from enforcing through legal process his or her established rights. To read the statute any differently is simply illogical.

If the majority's view is correct, however, one must also read subsection (c) as applying to the third clause of subsection (a), the like punishment clause. It provides that "[a]ll persons . . . shall be subject to like punishment, pains, penalties, taxes, license, and exactions." No one can argue seriously that an individual can subject another individual to unequal punishment or taxes.[1] As the *Mahone*

[1] Ironically, the majority actually makes an attempt. *See Maj. Op.* at 830, n. 2 ("Although not germane to Chapman's claim under section 1981's equal benefit clause, one could make a similar argument on the basis of subsection (a)'s like punishment clause."). The majority then posits that "[t]here is nothing unworkable, however, about the proposition that a given statute may proscribe conduct beyond that which all of those persons the statute regulates are actually capable of engaging in," and provides the example of an industrial dump-truck driver who may

(Continued on following page)

court remarked: "Only the state imposes or requires 'taxes, licenses, and exactions' and the maxim *noscitur a sociis* suggests that the 'punishment, pains [and] penalties' to which the clause refers are those imposed by the state." *Mahone,* 564 F.2d at 1029-30. A treatise has similarly observed: "Whether this clause of section 1981 is limited to state action, it is virtually inevitable that any claim based upon 'like punishment, pains, penalties, taxes, license, and exactions of every kind,' will involve a governmental entity." JOSEPH G. COOK & JOHN L. SOBIESKI, JR., 2 CIVIL RIGHTS ACTIONS, ¶ 5.03(D) (Matthew Bender & Co.2001).

The majority's reading is internally inconsistent unless one reads subsection (c) as applying to every clause of subsection (a). This in turn leads to the equally absurd result of holding that the like punishment clause applies to private conduct as well as state action.

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be incapable of violating a high-speed limit. The majority's argument is fallacious. Here, unlike the individual industrial dump-truck driver whose truck might not be able to exceed 75 miles per hour, private individuals are conceptually incapable of imposing taxes, licenses, and punishments, and are equally incapable-logically and categorically – of depriving another of the full and equal benefit of all laws and proceedings for the security of persons and property. Only governmental actors are capable of that.

State actors and private actors are different species in the eyes of the law, with dissimilar legal properties. Thus, laws that regulate one of these groups or classes usually are inapplicable to the other group. That is precisely the situation in this case. Just because Congress did not expressly state this does not mean it isn't so. Congress also did not state that § 1981 does not apply to animals, but I do not think anyone would-or has at least as of yet-suggested that it does.

2.

The majority claims that *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), precludes a finding that subsection (c)'s plain language is inconsistent with the statute's equal benefit provision. In *Griffin,* the Supreme Court held that 42 U.S.C. § 1985(3) does not require state action but reaches private conspiracies. Section 1985(3) provides a cause of action where "two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C.A. § 1985(3) (West 1994). The majority notes that the *Griffin* Court expressly rejected the notion that the concept of state action is implicit in an equal protection provision, relying on the following excerpt: "A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State." *Griffin,* 403 U.S. at 97, 91 S.Ct. 1790.

To begin, the language of the two provisions are not identical. Significantly, § 1985(3) expressly references "two or more persons." Section § 1981(a) does not contain a similar reference, but simply states that "all persons shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." *See Spencer,* 839 F.Supp. at 1020 n. 10 ("Unlike § 1981, however, § 1985(3) contains express language encompassing 'two or more

persons' who 'go on the highway' to deprive others of equal protection."); *see also Stevens v. Tillman,* 855 F.2d 394, 403 (7th Cir.1988) (observing that "[t]his statute addresses private acts – going 'in disguise on the highway' is a reference to the M.O. of the Ku Klux Klan-yet condemns only deeds that 'deprive' the victim of the 'equal protection of the laws, or of equal privileges and immunities under the laws', something within the domain of government exclusively. This admixture of private and public action has befuddled courts ever since."). This distinction is important, and key to the analysis here, as the following passage from *Griffin* reveals:

> We turn, then, to an examination of the meaning of § 1985(3). On their face, the words of the statute fully encompass the conduct of private persons. The provision speaks simply of "two or more persons in any State or Territory" who "conspire or go in disguise on the highway or on the premises of another." *Going in disguise, in particular, is in this context an activity so little associated with official action and so commonly connected with private marauders that this clause could almost never be applicable under the artificially restrictive construction of Collins [341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951)]. And since the "going in disguise" aspect must include private action, it is hard to see how the conspiracy aspect, joined by a disjunctive, could be read to require the involvement of state officers.*
>
> The provision continues, specifying the motivation required "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." This language is, of course, similar to that of § 1

of the Fourteenth Amendment, which in terms speaks only to the States, and judicial thinking about what can constitute an equal protection deprivation has, because of the Amendment's wording, focused almost entirely upon identifying the requisite "state action" and defining the offending forms of state law and official conduct. A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. *See, e.g., United States v. Harris,* 106 U.S. 629, 643, 1 S.Ct. 601, 27 L.Ed. 290 [1883]. . . . Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivation of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to "accord [them] a sweep as broad as [their] language." . . . Moreover, very similar language in closely related statutes has early and late received an interpretation quite inconsistent with that given to § 1985(3) in *Collins*. In construing the exact criminal counterpart of § 1985(3), the Court in *United States v. Harris, supra,* observed that the statute was "not limited to take effect only in case [of state action]," *id.,* at 639, 1 S.Ct. 601, . . . but "was framed to protect from invasion by private persons the equal privileges and immunities under the laws of all persons and classes of persons,"

> *id.*, at 637, 1 S.Ct. 601. . . . In *United States v. Williams,* 341 U.S. 70, 95, 71 S.Ct. 581, 95 L.Ed. 758 . . . , the Court considered the closest remaining criminal analogue to § 1985(3), 18 U.S.C. § 241. Mr. Justice Frankfurter's plurality opinion, without contravention from the concurrence or dissent, concluded that "if language is to carry any meaning at all it must be clear that the principal purpose of [§ 241], unlike [18 U.S.C. § 242], was to reach private action rather than officers of a State acting under its authority. *Men who 'go in disguise upon the public highway, or upon the premises of another' are not likely to be acting in official capacities.*" 341 U.S., at 76, 71 S.Ct. 581. . . . "Nothing in [the] terms [of § 241] indicates that color of State law was to be relevant to prosecution under it." *Id.*, at 78, 71 S.Ct. 581.

Griffin, 403 U.S. at 96-98, 91 S.Ct. 1790 (footnotes omitted; emphases added) (overruling *Collins,* which construed § 1985(3) as requiring presence of state action).

When read in full context, rather than the selective excerpt provided by the majority, it is clear that the *explicit* mention of private persons on the face of the statute was critical to the *Griffin* court's holding that § 1985(3) applies to private action. That is, unlike § 1981, § 1985(3) expressly applies to private action by explicitly referring to "two or more persons" who conspire.[2] Therefore,

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[2] In other words, rather than being proscriptive like § 1985(3) (providing a cause of action "[i]f two or more persons . . . conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the

(Continued on following page)

if one adheres to a plain meaning analytical framework, analogy to *Griffin* directs that private action would not be read into § 1981.

3.

The majority also claims that nothing in the legislative history of the 1991 amendments prevents this Court from applying subsection (c)'s plain language. Granted, Congress did not say that "by adding this subsection we mean that the equal benefit clause applies only to state and not private action." However, we can glean what the legislature intended from what it actually said:

> This section amends 42 U.S.C. § 1981 (commonly referred to as "Section 1981") to overturn *Patterson v. McLean Credit Union* and to codify *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415,. . . .
>
> Subsection (c) Prohibiting discrimination in private contracting. – This subsection is intended to codify *Runyon v. McCrary.* In *Runyon,* the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. *The Committee intends to prohibit racial discrimination in all contracts,* both public and private.

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laws"), § 1981 confers a right upon "[a]ll persons" and does not speak in terms of prohibiting private individuals from certain conduct.

H.R.Rep. No. 102-40(II), at 35, 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731 (emphasis added).[3]

Congress's intent in enacting subsection (c) could not have been any clearer. It intended to prohibit racial discrimination "in all contracts," because that is what is said, and only contracts, *because that is all it wrote.* The title of the amendment is also telling. *See generally I.N.S. v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991) (stating that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). The Civil Rights Act of 1991 is entitled as follows: "Restoring Prohibition Against All Racial Discrimination *in the Making and Enforcement of Contracts.*" H.R.Rep. No. 102-40(II), at 35 (emphasis added).

In short, we can determine what Congress intended from what it told us and from what it did not tell us. I am not aware of, and the majority does not cite, any statutory canon which requires a court to read a positive right, "and x," unless the legislature expressly proclaims "and not x," especially when "and x" is conceptually impossible. Contrary

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[3] As stated, the amendment was in direct response to the Supreme Court's opinion in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). *Patterson* held that § 1981 prohibited discrimination only in the making and enforcement of contracts, and did not extend to problems arising from conditions of continuing employment. In the Civil Rights Act of 1991, Congress explicitly reversed this aspect of *Patterson* by adding subsection (b) to § 1981, which states that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C.A. § 1981(b) (West 1994).

to what the majority says, that silence is not "equivocal." And it is certainly not a *tabula rasa* for courts to create rights.

4.

The majority's interpretation of subsection (c) with respect to the equal benefit clause also has the "absurd" result of federalizing state tort law. The majority opines that "it is unlikely that application of subsection (c)'s plain language will unleash the flood of cases Dillard's predicts . . . [because] [t]he language surrounding the 'full and equal benefit' clause serves to cabin both the number and nature of claims that may be brought under its ambit." *Maj. Op.*, at 832-33. That is, the majority believes that the right is sufficiently limited because the language "*for the security of persons and property* as is enjoyed by white citizens" limits the potential class of cases that may be brought under the equal benefit provision. One need look no further than the opening pages of PROSSER ON TORTS to understand that this "limitation" is not that because it encompasses, *inter alia,* all of tort law:

> Included under the head of torts are miscellaneous civil wrongs, ranging from simple, direct interferences with the person, such as assault, battery and false imprisonment, or with property, as in the case of trespass or conversion, up through various forms of negligence, to disturbances of intangible interests, such as those in good reputation, or in commercial or social advantage.
>
> . . .
>
> There remains a body of law whch [sic] is directed toward the compensation of individuals,

> rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required. This is the law of torts.
>
> The law of torts, then, is concerned with the allocations of losses arising out of human activities; and since they cover a wide scope, so does this branch of law. Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property whch [sic] may in any of a thousand ways affect the persons or property of others – in short, doing all the things that constitute modern living – there must of necessity be losses, injuries, of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as a result of the conduct of another.

PROSSER & KEETON ON THE LAW OF TORTS, § 1 (W. Page Keeton, *et. al.,* West Publishing Co. 5th ed.1984).

Under the majority's interpretation, the equal benefit clause conceivably can be applied to every garden-variety state tort law claim where the parties are of different races. If this is not federalization of tort law, I do not know what is. *See Spencer,* 839 F.Supp. at 1019 ("Reading the clause to encompass this kind of conduct, however, risks creating a section 1981 action whenever a white man strikes a black man in a barroom brawl. . . . Extending the 'equal benefit' clause to private conduct would have the effect of federalizing all racially-motivated state-law torts

that implicate 'the security of persons and property.'"). As the Supreme Court stated in *Patterson,* "[a]lthough we must do so when Congress plainly directs, as a rule we should be . . . 'reluctant to federalize' matters traditionally covered by state common law." *Patterson,* 491 U.S. at 183, 109 S.Ct. 2363 (quoting *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 479, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977)). As explained above, Congress did not plainly direct that § 1981 apply to state tort law (like it did for contracts). In its zeal to expand the scope of federal law, the majority has ignored *Patterson's* cautionary words.

III.

In sum, I would hold that nongovernmental actors may not be sued under the equal benefit clause of 42 U.S.C. § 1981(a), which applies only to state action. Therefore, I would hold that Chapman failed to state a cognizable § 1981 claim because the alleged private discrimination she suffered is not within the purview of the equal benefit clause. I concur in the majority's analysis of Chapman's claim under 42 U.S.C. § 1983, because I believe there is a question of fact as to whether Dillard's may be considered a state actor under the nexus test.

For this reason, I respectfully DISSENT as to the § 1981 claim.

256 F.3d 416

Lynette CHAPMAN, Plaintiff-Appellant,

v.

The HIGBEE COMPANY, d/b/a Dillard Department Stores, Inc., Defendant-Appellee.

No. 99-3970.

United States Court of Appeals
Sixth Circuit.

Argued Oct. 27, 2000.

Decided and Filed July 5, 2001.

David R. Grant (argued and briefed), Smith & Condeni, Cleveland, OH, for Plaintiff-Appellant.

John B. Lewis (argued and briefed), Thomas J. Piatak (briefed), and Gregory V. Mersol (briefed), Baker & Hostetler LLP, Cleveland, OH, Gregory E. O'Brien (briefed), Timothy D. Johnson (briefed), Weston, Hurd, Fallon, Paisley & Howley, Cleveland, OH, for Defendant-Appellee.

Gino J. Scarselli (briefed), Assoc. Legal Dir., Cleveland, OH, Michael W. Donaldson (briefed), Vorys, Sater, Seymour & Pease, Columbus, OH, for Amici Curiae.

Before: SUHRHEINRICH and MOORE, Circuit Judges; EDMUNDS, District Judge.*

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

EDMUNDS, District Judge.

Plaintiff-Appellant, Lynette Chapman, brought suit against Defendant-Appellee, Dillard Department Store, alleging that her rights were violated when a department store security officer stopped and searched her due to a suspicion of shoplifting. Chapman alleges that the stop and search were racially motivated and violated her right to the "full and equal benefit of the law" under 42 U.S.C. § 1981 and her right to be free from unreasonable search and seizure under the Fourth Amendment pursuant to 42 U.S.C. § 1983. This case raises two issues: 1) whether section 1981 provides a cause of action against a private party under the equal benefit clause and 2) whether the security guard in this case acted "under color of law." The district court granted summary judgment in favor of Dillard on these issues, and Chapman now appeals.[1] We **AFFIRM**.

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[1] The American Civil Liberties Union Foundation of Ohio, Inc. filed an amicus brief in favor of Chapman. The following merchants' associations from the states comprising the Sixth Circuit filed a joint amicus brief on behalf of Dillard: Ohio Council of Retail Merchants; Kentucky Retail Federation, Inc.; Michigan Retailers Association; and Tennessee Council of Retail Merchants. The ACLU argues that the equal benefit clause of section 1981 should be interpreted to broadly prohibit race-based discrimination and that it applies to private action. The merchants' associations argue that they should be free to employ any lawful means to protect themselves against shoplifting and that § 1981 does not apply to private action. See *infra*.

I.

Lynette Chapman is an African-American. On February 20, 1997, Chapman was shopping at Dillard Department Store in Cleveland, Ohio. She chose some clothing to try on, and a sales assistant pointed out a fitting room for her use. A white woman had just exited the fitting room and when Chapman entered, she noticed a sensor tag called a "kno-go" on the floor. After trying on some clothing, Chapman decided not to purchase anything and hung it back on the hangers. She left the fitting room to return the clothing to the racks. A sales assistant then entered the fitting room and noticed the sensor on the floor. Believing that the sensor had not been on the floor prior to Chapman's use of the fitting room and suspecting Chapman of shoplifting, the sales assistant notified security. A Dillard security guard then stopped Chapman and directed her back to the fitting room. He and a female manager checked Chapman's purse. Nothing was found. The female manager then accompanied Chapman into the fitting room and searched Chapman's clothing. The manager found nothing. Chapman pointed out the white woman whom she had seen exit the fitting room before she entered, but the security guard did not detain the white woman. Satisfied that Chapman had not stolen anything, the manager apologized to her, and Chapman left the store.

The Dillard security guard was an off-duty sheriff's deputy. He wore his official sheriff's department uniform, badge, and gun while working at Dillard. While he stopped and searched Chapman, he did not threaten to, or attempt to, arrest her.

As a result of this incident, Chapman brought suit against The Higbee Company, doing business as Dillard Department Stores, Inc., alleging 1) a violation of the full and equal benefit clause of 42 U.S.C. § 1981 and 2) violations of Chapman's right to be free from unreasonable search and seizure under the Fourth Amendment and her right to due process under the Fifth Amendment, which rights Chapman may enforce via 42 U.S.C. § 1983. Dillard moved for summary judgment. A magistrate judge, acting pursuant to the consent of the parties, granted Dillard's motion for summary judgment finding: 1) Chapman does not have a claim under the full and equal benefit clause of § 1981 because the clause does not apply to private action; and 2) Chapman does not have a claim under § 1983 because the Dillard security officer was not acting "under color of state law." Chapman moved for reconsideration, and the magistrate denied the motion and reaffirmed its prior ruling. Chapman now appeals.

II.

The standard of review for appeal of a summary judgment is *de novo. See Wolotsky v. Huhn,* 960 F.2d 1331, 1334 (6th Cir.1992). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails "to establish the existence of an

element essential to that party's case and on which that party bears the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III.

A.

Chapman argues that the Magistrate erred in finding that the full and equal benefit clause of § 1981 does not apply to private action. Section 1981 provides:

> (a) Statement of equal rights
>
> *All persons within the jurisdiction of the United States shall have the same right* in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental

> discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added).[2]

Congress amended § 1981 in 1991 by designating the original section as subsection "(a)" and by adding subsections (b) and (c). Pub.L. 102-166, § 101.

Chapman claims that the addition of subsection (c) to the statute makes it clear that the full and equal benefit clause applies to private action. Chapman argues that subsection (c) is unambiguous and thus the Court should not look to legislative history in order to interpret the statute. Further, Chapman contends that subsection (c) refers to "the rights protected by this section" and that the plural word "rights" must mean *all* of the rights protected by subsection (a), the right to the full and equal benefit of the laws as well as the right to make and enforce contracts. Moreover, Chapman argues that the absence of limiting language distinguishes this provision from other civil rights laws. For example, 42 U.S.C. § 1983 applies to persons who act "under color of law." Because Congress chose not to limit the application of subsection (c), Chapman argues that subsection (c) must apply to all of the rights protected by § 1981.

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[2] Section 1981 was originally passed pursuant to the Thirteenth and Fourteenth Amendments in order to eradicate the vestiges of slavery. *See Hawk v. Perillo,* 642 F.Supp. 380, 390 (N.D.Ill.1985); *Provisional Gov't of the Republic of New Afrika v. American Broad. Cos.,* 609 F.Supp. 104, 109 (D.D.C.1985).

It is axiomatic that a court may not look to legislative history in order to interpret a statute that is clear on its face. "There can be no construction where there is nothing to construe." *United States v. Hartwell,* 73 U.S. (6 Wall.) 385, 396, 18 L.Ed. 830 (1867); *Mahone v. Waddle,* 564 F.2d 1018, 1028 (3d Cir.1977). If "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Vergos v. Gregg's Enters., Inc.,* 159 F.3d 989, 990 (6th Cir.1998) (internal quotation marks and citations omitted).

We agree with Chapman that the statute is unambiguous and that it is not necessary to look to legislative history in order to interpret the statute's language. We disagree with Chapman's conclusion that the equal benefit clause applies to private action. Chapman's reading of subsection (c) is plausible only if subsection (c) is read in isolation. Yet, the statute must be read as a whole. Implicit in the concept of "full and equal benefit of all laws and proceedings for the security of persons and property" is state action. In other words, because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law. *See Mahone,* 564 F.2d at 1029. Thus, the full and equal benefit clause of subsection (a) can only refer to state action. With this understanding of the full and equal benefit clause, subsection (c) is properly understood as clarifying the nature of the various "rights" enumerated in subsection (a). That is, the "rights . . . protected against impairment by nongovernmental discrimination" applies to the "make and enforce contracts" clause, while the "rights . . . protected against . . . impairment under color of State law" refers to such clauses as the "full and equal benefit" clause of subsection

(a). Because Chapman's reading places subsection (a) and (c) in conflict, we reject it.

Even if Chapman's interpretation were correct, we could still look beyond the language of the statute if a literal interpretation would lead to 1) internal inconsistencies, 2) an absurd result, or 3) an interpretation inconsistent with the intent of Congress. *See Vergos,* 159 F.3d at 990. First, Chapman's reading of subsection (c) leads to an internal inconsistency. As discussed, subsection (c) cannot protect the right to equal benefit of all laws and proceedings from nongovernmental discrimination when only the government can deny equal benefit of all laws and proceedings.

Second, interpreting the equal benefit clause as applying to private action creates the absurd result of federalizing state tort law. The Supreme Court has cautioned against the creation of a general federal tort law. "[A]s a rule we should be and are 'reluctant to federalize' matters traditionally covered by state common law." *Patterson v. McLean Credit Union,* 491 U.S. 164, 183, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). As other courts have observed, § 1981 was designed to remove obstacles to full participation in the legal system and to provide blacks equal access to legal remedies and processes, not to federalize private torts. *See Sterling v. Kazmierczak,* 983 F.Supp. 1186, 1192 (N.D.Ill.1997).

Finally, Chapman's interpretation is inconsistent with the intent of Congress. Chapman contends that the legislative history establishes that the purpose of the 1991 amendments was to respond to recent decisions of the Supreme Court by broadly expanding the scope of relevant civil rights statutes. The Congressional record, however,

does not support such a broad intent. The legislative history reflects that in adding subsection (c) to the statute, Congress merely codified *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), which held that § 1981's contract clause applied to private entities. H. Rep. No. 40, 102d Cong., 1st Sess., Pt. II, at 37 (1991), U.S. Code Cong. & Admin. News at 549, 731 (this subsection is intended to codify *Runyon*).[3] *See Philippeaux v. North Cen. Bronx Hosp.,* 871 F.Supp. 640, 655 (S.D.N.Y.1991); *accord Ebrahimi v. City of Huntsville Bd. of Educ.,* 905 F.Supp. 993, 995 n. 2 (N.D.Ala.1995). *See also Dennis v. County of Fairfax,* 55 F.3d 151 (4th Cir.1995) (1991 amendments do not overrule *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), which held that 42 U.S.C. § 1983 is exclusive remedy for violation of § 1981 by state action). Further, if Congress had intended to create a tort remedy for victims of private racially-motivated discrimination, "Congress would not have departed so abruptly from current decisional law without stating explicitly that it was doing so." *Spencer v. Casavilla,* 839 F.Supp. 1014, 1019 n. 9 (S.D.N.Y.1993), *aff'd in part, appeal dismissed in part,* 44 F.3d 74 (2d Cir.1994). "If the 'equal benefit' clause of § 1981 were extended . . . to reach private action, the court sees no limiting principle to

[3] The legislative history of the 1991 amendments only briefly mentions subsection (c). It largely focuses upon subsection (b), which was enacted in order to overrule part of the Supreme Court's opinion in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1991). In *Patterson,* the Supreme Court held that § 1981's prohibition against discrimination in contracting applied only to the formation of contracts and not to post contract discrimination. Section 1981(b) was added to prohibit post contract discrimination as well.

prevent its becoming the 'general federal tort law' the Supreme Court has expressly rejected." *Id.* at 1019.

This result is also supported by the case law. The majority of courts, both pre- and post-the 1991 amendment, have held that the full and equal benefit clause applies to state action and not to private action. In one of the first cases to consider the issue, *Mahone, supra,* the Third Circuit distinguished between the two substantive provisions of § 1981, observing that the right to make and enforce contracts is concerned with relations between private individuals, and thus private individuals can be held liable for violating § 1981's contract clause,[4] whereas the equal benefit clause concerns the relations between an individual and the state and thus only state actors can be liable under the equal benefit clause.

> The state, not the individual, is the sole source of the law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, *the concept of state action is implicit in the equal benefits clause.*

564 F.2d at 1029 (emphasis added). *Accord Shaare Tefila Congregation v. Cobb,* 785 F.2d 523, 525-26 (4th Cir.1986),

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[4] Chapman did not allege a cause of action under the "make and enforce contracts" clause of § 1981. Courts have rejected such a claim made by plaintiffs who were falsely accused of shoplifting. *See e.g., Lewis v. J.C. Penney Co.,* 948 F.Supp. 367, 373 (D.Del.1996) (no refusal to contract where plaintiff had completed shopping and was leaving store).

rev'd in part on other grounds, 481 U.S. 615, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987); *Lewis v. J.C. Penney Co.,* 948 F.Supp. 367, 371 (D.Del.1996); *Spencer,* 839 F.Supp. at 1018-19; *Brooks v. ABC,* 737 F.Supp. 431, 440 (N.D.Ohio 1990), *vacated in part on other grounds,* 932 F.2d 495 (6th Cir.1991); *Rochon v. Dillon,* 713 F.Supp. 1167, 1172 (N.D.Ill.1989); *Provisional Gov't of the Republic of New Afrika v. American Broad. Cos.,* 609 F.Supp. 104, 109 (D.D.C.1985); *Eggleston v. Prince Edward Volunteer Rescue Squad,* 569 F.Supp. 1344, 1353 (E.D.Va.1983), *aff'd without op.,* 742 F.2d 1448 (4th Cir.1984); *Williams v. Northfield Mount Hermon Sch.,* 504 F.Supp. 1319, 1332 (D.Mass.1981). *See also Sterling,* 983 F.Supp. at 1192 (equal benefit clause does not create federal tort remedy against private party).

These courts have emphasized that interpreting the clause to apply to private action would give rise to a federal cause of action for every racially motivated private tort. *See Mahone,* 564 F.2d at 1029.

> Although it is conceptually possible for a private party to deprive another of the "equal benefit" of those laws, it is difficult to imagine what such a deprivation would be other than the violation of the state laws themselves, coupled with a racial animus. Reading the clause to encompass this kind of conduct, however, risks creating a § 1981 action "whenever a white man strikes a black [man] in a barroom brawl."

Spencer, 839 F.Supp. at 1019.

A minority of courts have held that the equal benefit clause applies to private action. *See Franceschi v. Hyatt Corp.,* 782 F.Supp. 712, 724 (D.P.R.1992) (cause of action under equal benefit clause against private hotel for denial

of accommodation based on race); *Carey v. Rudeseal,* 703 F.Supp. 929, 930 n. 1 (N.D.Ga.1988) (cause of action under equal benefit clause against members of Ku Klux Klan for assault); *Hawk v. Perillo,* 642 F.Supp. 380, 392 (N.D.Ill.1985) (cause of action under equal benefit clause against individuals who committed racially-motivated assault); *Central Presbyterian Church v. Black Liberation Front,* 303 F.Supp. 894, 898-99 (E.D.Mo.1969) (cause of action under equal benefit clause against individuals who interfered with First Amendment freedom to worship by disrupting church service).

In *Hawk v. Perillo,*[5] 642 F.Supp. 380, the leading opinion for the minority view, the court examined the legislative history of the statute and found that it should be interpreted broadly. Section 1981 originated in section 1 of the Civil Rights Act of 1866.[6] When Congress enacted

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[5] *Hawk v. Perillo* has since been rejected by another court in the Northern District of Illinois. *See Rochon v. Dillon,* 713 F.Supp. 1167, 1172 (N.D.Ill.1989) (court elected to follow *Mahone*).

[6] Section 1 of the Civil Rights Act of 1866, the predecessor to 42 U.S.C. § 1981, provided:

> That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit of all laws and proceedings for the security of person and property,* as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

(Emphasis added.)

the 1866 statute, it intended to eliminate all race discrimination, both public and private, because "[d]uring the Congressional debates, assaults on blacks by private citizens were referred to on several occasions." *Hawk,* 642 F.Supp. at 391 (citing Cong. Globe, 39th Cong., 1st Sess., 339-40, 1835).

This general reference, however, did not manifest in the language of the equal benefit clause, which refers only to "the full and equal benefit of all laws and proceedings for the security of persons and property. . . . " Thus, *Hawk's* reasoning that "[t]he absence of any words expressly limiting Section 1981 to official acts of discrimination indicates that Congress did not intend to restrict the operation of that Section to such conduct," 642 F.Supp. at 390, is in error. The equal benefit clause of § 1981 is limited to state action because it is understood that only the state is capable of granting or denying equal access to the law. "[T]he concept of state action is implicit in the equal benefits clause." *Mahone,* 564 F.2d at 1029.

Hawk found further support for its broad interpretation by looking to three other statutes: 1) section 2 of the Civil Rights Act of 1866; 2) 42 U.S.C. § 1982; and 3) 42 U.S.C. § 1985(3). First, section 2 of the Civil Rights Act of 1866 provided for criminal sanctions against persons who violated the rights secured by section 1 by acting under color of law.[7] In other words, private acts of discrimination

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[7] Section 2 of the Civil Rights Act of 1866 provided:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or

(Continued on following page)

were exempted from criminal sanction. *Hawk* inferred from this distinction that the rights secured by section 1 must have been rights to be free of private as well as public discrimination. *See Hawk,* 642 F.Supp. at 391. This reasoning, however, goes too far. The section 2 exemption of some private conduct from criminal sanctions does not establish that *all* of the rights covered in section 1 were rights protected from private discrimination.

Second, *Hawk* pointed out that section 1 of the Civil Rights Act of 1866 was the predecessor to 42 U.S.C. § 1982, which prohibits discrimination in property transactions.[8] Because of their common origin, courts interpret 1981 and 1982 similarly. So it follows, according to *Hawk,* that because § 1982 applies to private action, § 1981 must apply to private action. *See id.* Again, however, the protection from private discrimination in the context of property transfers, which is afforded by § 1982, does not establish that the equal benefit clause of § 1981 extends to private discrimination.

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to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

[8] 42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Finally, the *Hawk* court compared § 1981 to 42 U.S.C. § 1985(3) and noted that § 1985(3) contains some language similar to the equal benefit clause. Section 1985(3) provides, "If two or more persons . . . conspire . . . or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for recovery of damages. . . . " The Supreme Court has interpreted § 1985(3) as applying to private as well as official action. *See Griffin v. Breckenridge,* 403 U.S. 88, 101, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). Accordingly, the court in *Hawk* found that the equal benefit clause of 1981 similarly applies to private action. *See Hawk,* 642 F.Supp. at 392.

Section 1981 is not analogous to § 1985(3) even though § 1981 refers to "the full and equal benefit of all laws and proceedings" and § 1985(3) refers to "equal protection of the laws." Unlike § 1981, § 1985(3) expressly applies to private action by referring to "two or more persons" who conspire. Section 1981 contains no such language.[9]

In sum, we hold that § 1981's equal benefit clause applies only to state action. Thus, the district court's grant of summary judgment and dismissal of Chapman's § 1981 claim is affirmed. Chapman's remedy lies in state law.

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[9] In addition, the *Hawk* court ignored the need, recognized in *Griffin,* to confine the reach of the federal civil rights laws so as not to create a general federal tort law. *See Griffin v. Breckenridge,* 403 U.S. 88, 101, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

B.

Chapman alleges in her Complaint that Dillard violated her constitutional rights under 42 U.S.C. § 1983, specifically, her Fourth Amendment right to be free from unreasonable search and seizure and her Fifth Amendment right not to be deprived of life, liberty, or property without due process.[10] In order to state a claim under § 1983, Chapman must show that Dillard deprived her of her constitutional rights "under color of state law." *Parratt*

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[10] While it was not addressed below, Chapman does not have a viable Fifth Amendment claim in this case. The Fifth Amendment applies to federal action, not to private action or state action. *See Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Because Dillard is not in any way associated with the federal government, Chapman has no claim under the Fifth Amendment. *See Three Rivers Cablevision Inc. v. City of Pittsburgh,* 502 F.Supp. 1118, 1134 (W.D.Pa.1980). The Court could liberally construe the Complaint as alleging due process claim under the Fourteenth Amendment. However, because Chapman's claim is specifically covered by the Fourth Amendment, she does not have a due process claim under the Fourteenth Amendment. Violations of substantive due process originally were divided into two kinds: (1) deprivation of a particular constitutional guarantee, and (2) actions that government officials may not take no matter what procedural protections accompany them, alternatively known as actions that "shock the conscience." *See Braley v. City of Pontiac,* 906 F.2d 220, 224-25 (6th Cir.1990) (citing *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). An unreasonable search or seizure is a violation of the Fourth Amendment, made applicable to the states through the Fourteenth Amendment. Thus, a Fourth Amendment violation gives rise to a substantive due process violation of the first type. *See Wilson v. Beebe,* 770 F.2d 578 (6th Cir.1985). The Supreme Court has made it clear that a Fourth Amendment claim of unreasonable search and seizure cannot be a substantive due process violation of the second type, as it must be analyzed under the reasonableness standard, not the "shocks the conscience" standard. *See United States v. Lanier,* 520 U.S. 259, 117 S.Ct. 1219, 1228 n. 7, 137 L.Ed.2d 432 (1997).

v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The requirement of state action serves two important public policies. First, it preserves individual freedom by limiting the reach of federal power. Second, it avoids imposing on the state responsibility for conduct for which it cannot be fairly blamed. *See Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

A private party's actions constitute state action under § 1983 where the private entity's actions may be "fairly attributable to the state." *Lugar,* 457 U.S. at 937, 102 S.Ct. 2744. In order to determine whether there was state action in a particular case, the Supreme Court has developed three tests: 1) the public function test; 2) the state compulsion test; and 3) the symbiotic relationship or nexus test. *See Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir.1992). In her brief on appeal, Chapman argues that summary judgment should have been denied because there was a genuine issue of material fact regarding whether there was state action under either the public function test or the nexus test.

1. Public Function Test

Under the public function test, a private party is deemed to be a state actor if he exercised powers traditionally exclusively reserved to the state. This has been interpreted narrowly. Only functions like holding elections, *see Flagg Bros. v. Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), exercising eminent domain, *see Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), and operating a company-owned town,

see Marsh v. Alabama, 326 U.S. 501, 505-09, 66 S.Ct. 276, 90 L.Ed. 265 (1946), fall under this category of state action. Courts have consistently held that the mere fact that the performance of private security functions may entail the investigation of a crime does not transform the actions of a private security officer into state action. *See Wade v. Byles,* 83 F.3d 902, 905 (7th Cir.1996); *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442, 1457 (10th Cir.1995); *White v. Scrivner Corp.,* 594 F.2d 140, 142-43 (5th Cir.1979).

In *White,* the Fifth Circuit held that the detention of a suspected shoplifter is not an exclusive state function.

> A merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. Experience teaches that the prime responsibility for protection of personal property remains with the individual. A storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism. Such action cannot logically be attributed to the state.

594 F.2d at 142 (citation omitted). Applying these principles to the case at hand, the Court is satisfied that the Dillard security officer was not performing a function exclusively reserved to the State when he stopped and searched Chapman. Under the public function test, there was no state action.

2. Symbiotic Relationship/Nexus Test

Under the symbiotic or nexus test, a plaintiff must demonstrate that there is a sufficiently close nexus between

the government and the private party's conduct so that the conduct may be treated as that of the state itself. *See Jackson,* 419 U.S. at 351, 95 S.Ct. 449. Thus, a state can be held responsible for a private action when it has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Simescu v. Emmet County Dept. of Soc. Services,* 942 F.2d 372, 374 (6th Cir.1991) (quoting *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). The state must be intimately involved in the challenged conduct. *See Wolotsky,* 960 F.2d at 1335.

The inquiry is fact specific and the presence of state action is determined on a case by case basis. *See Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Factors tending to show state action must be examined individually and in the aggregate. *Simescu,* 942 F.2d at 375. Applying the state action doctrine, however, is "slippery and troublesome." *International Soc'y for Krishna Consciousness, Inc. v. Air Canada,* 727 F.2d 253, 255 (2d Cir.1984). It has been referred to as the "paragon of unclarity." *Gallagher,* 49 F.3d at 1447. This is particularly true in the area of off-duty police officers acting as security guards.

The acts of an on-duty police officer are acts done "under color of law," whether done in the proper performance of official duties or whether done outside of the officer's authority. "Acts of [police] officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws v. United States,* 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). Further, courts have consistently held that an off-duty police officer who works as a security guard

engages in state action when he seeks to perform official police duties *and* presents himself as a police officer via a statement identifying himself, a uniform, or a badge. For example, in *Abraham v. Raso,* 183 F.3d 279 (3d Cir.1999), the court found state action in the case of an off-duty officer who worked as a security guard in a shopping mall. The court explained that she acted under color of law when she shot a shoplifter because she was wearing a police uniform, she repeatedly ordered the suspect to stop, and she sought to arrest the suspect. *See id.* at 287. *Accord Lusby v. T.G. & Y. Stores, Inc.,* 749 F.2d 1423 (10th Cir.1984) (off-duty, out of uniform police officer employed as store security guard who showed badge and identified himself as police acted under color of law); *Benschoter v. Brown,* No. 96-2366-JWL, 1997 WL 382070, 1997 U.S. Dist. Lexis 9804 (D.Kan. June 12, 1997) (security guards who identified themselves as police and told plaintiff he could be arrested for unsafe driving were not state actors because they did not take police action by arresting plaintiff; instead they called their private employer); *Herrera v. Chisox Corp.,* No. 93 C 4279, 1995 WL 599065, 1995 U.S. Dist. Lexis 14719 (N.D.Ill. Oct.6, 1995) (when off-duty, out of uniform police officers employed as stadium security guards detained suspected ticket scalper in stadium office, they did not act under color of law because they did not take any action related to their duties as police); *Ewing v. Budget Rent-A-Car,* No. 92C 1714, 1992 WL 276961, 1992 U.S. Dist. Lexis 14999 (N.D.Ill. Sept. 30, 1992) (no state action where off-duty out of uniform police woman identified herself as off-duty officer and called police to make arrest).

The Sixth Circuit has gone even further by holding that when an officer acts pursuant to his official duty, even without identifying himself as a policeman and without a

uniform or badge, he engages in state action. *See Stengel v. Belcher,* 522 F.2d 438 (6th Cir.1975). The fact that a police officer is on or off duty, or in or out of uniform, does not determine whether his actions are state actions. Courts must examine the nature of the act performed. *See id.* at 441. In *Stengel,* an off-duty police officer intervened in a barroom dispute. The officer maced, shot, and killed two individuals and paralyzed a third during the altercation. The individuals brought a civil rights suit, and the officer defended, claiming that he was not liable under § 1983 because his actions were not taken under color of law. The officer claimed that at the time he was engaged in private social activity and was acting as a private citizen. Although the officer was not on duty and not in uniform and he did not identify himself as an officer at any time during the altercation, the court held that he was in fact a state actor. He used mace and a pistol that the police department required him to carry at all times, and, most importantly, police department policy required him to take action to intervene in any criminal activity, even when he was off-duty. The officer acted pursuant to his official duty.

In contrast, when a police officer acts as a private citizen, not pursuant to police department policy and without identifying himself as an officer, his actions are private actions which do not fall under § 1983. For example, in *Barna v. City of Perth Amboy,* 42 F.3d 809 (3d Cir.1994), off-duty officers who were out of their jurisdiction assaulted an individual during a personal altercation. The court held that the officers did not act under color of law, even though they used an official night stick during the assault. The court emphasized that while the use of the official weapon "furthered" the constitutional violation,

courts generally require additional indicia of state authority before finding state action. *See id.* at 817 & 819.

Similarly, in *Robinson v. Davis,* 447 F.2d 753, 758-59 (4th Cir.1971), the court held that town police employed as part time college security officers did not act under color of law in the course of questioning students during a college initiated drug investigation. Although the officers wore their town police uniforms and sidearms, they did not perform any duty imposed on them by the state and they did not purport to act as town police during the investigation. The college had instructed them not to make any arrests during the investigation.

Just as an off-duty police officer who acts with actual authority, *see Stengel, supra,* is deemed to be a state actor, a private party who purports to exercise official authority can be a state actor. "It is [also] clear that under 'color' of law means under 'pretense' of law." *Screws,* 325 U.S. at 111, 65 S.Ct. 1031. In *Griffin v. Maryland,* 378 U.S. 130, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964), a private park employed a security guard who was deputized as a county sheriff. Although the guard was an agent of the private park owner and acted as a private security guard, the Court held that he acted under color of law. When he ordered the plaintiff to leave the park, escorted him out, and arrested him, the guard wore a county sheriff's badge, identified himself as a deputy sheriff, and purported to exercise the authority of a deputy sheriff. *See id.* at 135, 84 S.Ct. 1770.

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a

> purely private capacity or that the particular action which he took was not authorized by state law.

Id.

In the context of store security officers, courts also have found state action where there was a prearranged plan between the police and the merchant. Thus, in *Smith v. Brookshire Bros.,* 519 F.2d 93 (5th Cir.1975), the court held that there was state action because the police routinely arrested suspected shoplifters solely based on the information provided by the merchant without any independent investigation. *Cf. Cruz v. Donnelly,* 727 F.2d 79 (3d Cir.1984) (where no preexisting plan between merchant and police and police conducted independent investigation, merchant's detention of suspected shoplifter was not state action); *White,* 594 F.2d at 143 (same). Where a state statute authorizes a merchant to detain a suspected shoplifter for the purpose of calling the police, a merchant who acts pursuant to the statute is engaged in private action, so long as the police make the arrest based on their own judgment and not based on a preexisting plan or based solely on the merchant's judgment. *See Lewis,* 948 F.Supp. at 373; *Anderson v. Randall Park Mall Corp.,* 571 F.Supp. 1173, 1175-76 (N.D.Ohio 1983). "[S]tate action cannot be found where . . . the [state] statutes do not compel detention of trespassers or shoplifters, but merely authorize and acquiesce in certain procedures for detention if a private party elects to do so." *Id.* at 1176.

Courts have also looked to other factors to determine whether there was state action, such as government regulation, the existence of a government contract, and dual employment. Each of these standing alone has been deemed insufficient to constitute state action. *See Jackson,*

419 U.S. at 350-52, 95 S.Ct. 449 (extensive governmental regulation, standing alone, is not sufficient to establish state action); *Rendell-Baker v. Kohn,* 457 U.S. 830, 840-42, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (mere fact that private entity contracted with government does not convert the private actions into state actions); *Wolotsky,* 960 F.2d at 1336 ("Acts of private contractors do not become the acts of the government by reason of their significant or even total engagement in performing public contracts."); *Simescu,* 942 F.2d at 375 (fact that individual is dual employee of private sector and of government for purposes of workers' compensation is not relevant).

Here, the Dillard security guard who stopped and searched Chapman was an off-duty sheriff's deputy, wearing his official sheriff's department uniform, badge, and sidearm. He briefly stopped and searched Chapman, but did not arrest or threaten to arrest her, nor did he contact the sheriff's department. Under the circumstances of this case, the off-duty deputy did not act pursuant to his official duties and thus did not engage in state action.

Chapman argues that the security guard was a state actor because as an off-duty sheriff's deputy he had the power to arrest and to transport suspects to the police station, he could sign an arrest warrant with his rank and badge number, and he could run an outstanding warrant check on detained suspects and arrest on any outstanding warrant. While the off-duty officer/security guard retained the power to act as a sheriff's deputy, in this case he did not exercise that power. He did not arrest or threaten to arrest Chapman, nor did he contact the sheriff's department. The nature of his actions were not state actions.

Chapman also argues that there was state action because the sheriff's department retains control over the deputies while they work at Dillard. The sheriff's department requires off-duty officers to follow department rules and procedures, the department has to approve of a deputy working at Dillard, and the department can terminate an officer's off-duty work at Dillard. Also, the department posts job openings at Dillard. In addition, until April of 1998 there was an annual written indemnity and hold harmless agreement between Dillard and the sheriff department. Chapman's argument lacks merit because none of the foregoing facts amounts to evidence of a prearranged plan between the sheriff's department and Dillard concerning the execution or scope of the security officer's duties, nor does it constitute evidence of a state law which compelled the security guard to act. *See Lewis,* 948 F.Supp. at 373; *Anderson,* 571 F.Supp. at 1175-76. Moreover, as explained above, the security guard in this case did not perform or seek to perform his official duties as a sheriff's deputy; instead, he acted pursuant to his duties as a private security guard. Accordingly, the district court's ruling granting summary judgment in favor of Dillard and dismissing the § 1983 claim is affirmed.

IV.

The equal benefit clause of 42 U.S.C. § 1981 requires state action as does 42 U.S.C. § 1983. Because the actions of the off-duty sheriff's deputy Dillard employed as a security guard in this case were private actions, the district court's dismissal of Chapman's claims against Dillard under §§ 1981 and 1983 is **AFFIRMED**.

SUHRHEINRICH, Circuit Judge, concurring.

I fully concur in the majority's reasoning. I write separately to respond to the dissent.

The dissent believes that the language of § 1981 is perfectly clear: "according to subsection (c), the rights protected by subsection (a), *i.e.*, the rights 'to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property,' are protected against impairment by private acts of discrimination." *Ante,* at 438. The dissent feels that because there is no modifier limiting the word "rights" to only certain clauses in subsection (a), the phrase "rights protected by this section" must mean all enumerated rights in subsection (a).[1]

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[1] The dissent also argues that "the limiting language surrounding the 'full and equal benefit' clause . . . serves to cabin both the number and nature of claims that may be brought under this clause." *Ante, at* 440. In other words, the dissent claims that its interpretation of § 1981 would not have the "absurd result of federalizing tort law" because "the full and equal benefit of all laws and proceedings" is limited to those "*for the security of persons and property* as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (emphasis added).

However, one need look no further than the opening pages of Prosser on Torts to understand that the limiting phrase "for the security of persons and property" encompasses tort law:

> Included under the head of torts are miscellaneous civil wrongs, ranging from simple, direct interferences with the person, such as assault, battery and false imprisonment, or with property, as in the case of trespass or conversion, up through various forms of negligence, to disturbances of intangible interests, such as those in good reputation, or commercial or social advantage. . . . [I]t is not easy to discover any general principle upon which they may all be

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However, to read the statute this way requires one to *not* read the phrase "full and equal benefit of all laws and proceedings" according to its ordinary and common meaning. As the dictionary definition establishes, implicit in the concept of "law" is state action: "a binding custom or practice of a community: a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory

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based, unless it is the obvious one that injuries are to be compensated, and anti-social behavior is to be discouraged.

. . . .

There remains a body of law whch [sic] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required. This is the law of torts.

The law of torts, then, is concerned with the allocations of losses arising out of human activities; and since they cover a wide scope, so does this branch of law. Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons of property of others – in short, doing all the things that constitute modern living – there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.

Prosser & Keeton on Torts, § 1, p. 3-6 (5th ed.1984).

In short, under the dissent's interpretation, the equal benefit clause could be applied to every garden-variety state tort claim with a racial component. If this is not federalization of tort law, I do not know what is.

by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision, or usage) made, recognized, or enforced by the controlling authority." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1278 (1986). This perception of the term "law" would have been shared by members of the Thirty-ninth Congress:

> Law:
>
> 1. A rule, *particularly* an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions. Laws are *imperative* or *mandatory,* commanding what shall be done; *prohibitory,* restraining from what is to be forborne; or *permissive,* declaring what may be done without incurring a penalty.

Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE at 651 (rev. & enlarged, Springfield, Mass., George & Charles Merriam 1864). And it is to the dictionary that we look in determining the plain meaning of a word. *See, e.g., Williams v. Taylor,* 529 U.S. 420, 120 S.Ct. 1479, 1488, 146 L.Ed.2d 435 (2000) (employing dictionary definitions to ascertain the ordinary, commonsense meaning of words in statute); *United States v. Johnson,* 529 U.S. 53, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000) (same).

Only the state can prescribe laws, and only the state can *deprive* an individual of the benefit of those laws.[2] As the Third Circuit observed, and as the majority noted:

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[2] By contrast, an individual *violates* laws. An individual may cause injury to another in the process of violating a law, but this cannot

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> The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Mahone v. Waddle, 564 F.2d 1018, 1029 (3d Cir.1977).[3]

Ironically, the dissent omits reference to the third clause in subsection (a): the like punishment clause, which provides that "[a]ll persons . . . shall be subject to like punishment, pains, penalties, taxes, license, and exactions." No one can seriously argue that an individual can subject another individual to unequal punishment or taxes. As *Mahone* remarked: "Only the state imposes or requires 'taxes, licenses, and exactions' and the maxim *noscitur a sociis* suggests that the 'punishment, pains [and] penalties' to which the clause refers are those imposed by the state." *Id.* Yet, to accept the dissent's argument, one

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rightly be viewed as a *deprivation* of "the full and equal benefit of all law and proceedings for the security of persons and property." That is because a private actor does not give protections under the law, and therefore cannot take them away. Private injury can be redressed by law, however.

[3] The dissent finds significance in the fact that "neither the Supreme Court nor this court has ever limited the application of subsection (c) to the 'make and enforce contracts' clause in subsection (a)." *Ante,* at 439. True. Also true is the fact that neither this Court nor the Supreme Court has ever been presented with the question of whether the equal benefit or like punishment clause covers private conduct. As the dissent well knows, federal courts are not at leisure to comment on issues not properly before them.

must agree that the like punishment clause applies to private conduct as well.

The dissent responds to this argument with the following remark: "In our experience, it is the state that usually imposes punishment, etc. upon its citizens. Such was not the case, however, when the Act of 1866, the precursor to § 1981, was passed." *Ante,* at 438 n. 1. In addition to being a highly selective interpretation of history, *see, e.g.,* Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981,* 98 Yale L.J. 541, 549 (1989) ("The Black Codes enacted by the Southern states under Presidential Reconstruction, as well as widespread acts of private discrimination and violence against Freedmen, convinced Republican leaders that legislative action was needed.")[4]; Barry L. Refsin, *The Lost Clauses of Section 1981: A Source of Greater Protection After* Patterson v. McLean Credit Union, 138 U. Pa. L.Rev. 1209, 1217 (1990) (noting that the 1866 Act "was proposed and finally adopted against [a] background of *restrictive laws, [and]* private discrimination, and violence" (emphasis added)), the dissent's remark ignores the common understanding of these terms at the

[4] The dissent relies on a phrase in a congressional report before the Thirty-ninth Congress describing "a pattern of private violence 'by men who announce their determination to take the law into their own hands.'" *Historical Reconstruction,* 98 Yale L.J. at 553 (quoting S. EXEC. DOC. No. 2, 39th Cong., 1st Sess. at 18 (quoting report of Brigadier General Fessenden)). The dissent maintains that this colloquialism supports the argument that the terms "punishment, pains, and penalties," as used in a section in the United States Code, means something other than the dictionary definitions of those terms. I do not think such a figure of speech should carry more weight than the dictionary definitions in matters of statutory interpretation.

time the 1866 Act was passed. The following definitions are found in the 1864 edition of Noah Webster's AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, *supra:*

> Punishment:
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> n. Any pain or suffering inflicted on a person for a crime or offense, by the authority to which the offender is subject, either by the constitution of God or of civil society. The *punishment* of the faults and offenses of children, by the parent, is by virtue of the right of government with which the parent is invested by God himself. This species of *punishment* is *chastisement* or *correction.* The *punishment* of crimes against the laws is inflicted by the supreme power of the state, in virtue of the right of government vested in the prince or legislature. The right of *punishment* belongs only to persons clothed with authority. Pain, loss, or evil, willfully inflicted on another, for his crimes or offenses, by a private, unauthorized person, is *revenge,* rather than *punishment.*

at 889.

> Penalty:
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> 1. The suffering in person or property which is annexed by law or judicial *decision* to the commission of a crime, offense, or trespass, as a punishment. A fine is a pecuniary *penalty.* The usual *penalties* inflicted on the person are whipping, cropping, branding, imprisonment, hard labor, transportation, or death.

at 810.

> Pain:
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> (n.) 1. An uneasy sensation in animal bodies, of any degree from slight uneasiness to extreme distress or torture, proceeding from pressure, tension, or spasm, separation of parts by violence, or any derangement of functions. This violent pressure or stretching of a limb gives *pain;* inflammation produces *pain;* wounds, bruises, and incisions give *pain.*
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> . . . .
>
> 6. Penalty; punishment suffered or denounced; suffering or evil inflicted as punishment for a crime, or annexed to the commission of a crime.

at 790.

In short, there is little support for the dissent's semantical argument.[5]

The only way the dissent's argument works is if one strips the language of the second and third subclauses of subsection (a) of their plain meaning. This approach violates another equally fundamental canon of statutory construction: "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121

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[5] Furthermore, the argument strains the limits of common sense. As one treatise has observed: "Whether this clause of section 1981 is limited to state action, it is virtually inevitable that any claim based upon 'like punishment, pains, penalties, taxes, license, and exactions of every kind,' will involve a governmental entity. . . . " Cook & Sobieski, 2 CIVIL RIGHTS ACTIONS, ¶ 5.03(D) (Matthew Bender & Co.2001).

(2000). Furthermore, a statute is to be read in its entirety, *see Ratzlaf v. United States,* 510 U.S. 135, 140, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), so as to avoid an absurd construction of a statutory provision. *See New York Life Ins. Co. v. United States,* 190 F.3d 1372, 1382 (Fed.Cir.1999). The dissent's reading of the statute produces an absurd result because a private individual simply cannot deprive another of the equal benefit of the laws or subject another to any punishment or tax.

The legislative history behind subsection (c) does not help the dissent either. I agree with the dissent that the legislative history to the 1991 Amendment is not lengthy. But that is perhaps because Congress had a single-minded purpose:

> This section amends 42 U.S.C. § 1981 (commonly referred to as "Section 1981") to overturn *Patterson v. McLean Credit Union* and to codify *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).
>
> . . . .
>
> Subsection (c) Prohibiting discrimination in private contracting. – This subsection is intended to codify *Runyon v. McCrary.* In *Runyon,* the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. *The Committee intends to prohibit racial discrimination in all contracts,* both public and private.

H.R.Rep. No. 102-40(II), at 37 (1991), U.S. Code Cong. & Admin. News at 549, 731 (emphasis added).

Congress's intent in enacting subsection (c) could not have been any clearer: it intended to prohibit racial

discrimination "in all contracts," but only contracts, *because that is all it wrote.*[6] Yet, the dissent thinks that Congress's failure to explain that the effect of subsection (c) on other rights enumerated in subsection (a) means that "rights" must mean that subsection (a) refers to the right to full and equal benefit of all laws and proceedings, like punishment, as well as the right to make and enforce contracts. However, Congress does not need to state the obvious. That is, Congress did not need to explain that the equal benefit and like punishment clauses of subsection (a) do not apply to private conduct *because they logically cannot.*

The dissent also derives support from § 1981's "constitutional legacy." *Ante,* at 441. The dissent has a tough row to hoe here. As the dissent acknowledges, § 1981 emanates not only from the Thirteenth Amendment, but also the Fourteenth Amendment.[7] As the dissent also acknowledges,

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[6] This amendment was in direct response to the Supreme Court's opinion in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). *Patterson* held that § 1981 prohibited discrimination only in the making and enforcement of contracts, and did not extend to problems arising from conditions of continuing employment. In the Civil Rights Act of 1991, Congress explicitly reversed this aspect of *Patterson* by adding subsection (b) to § 1981, which states that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

[7] In *General Bldg. Contractors Ass'n v. Penn.,* 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982), the Court explained:

> [T]he origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment. The 1866 Act represented Congress'

(Continued on following page)

§§ 1981 and 1982 were responding to discriminatory state action, *i.e.*, the Black Codes, *see Gen. Bldg. Contractors Ass'n v. Penn.*, 458 U.S. 375, 386, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) ("The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen"), as well as discriminatory private conduct, *i.e.*, mistreatment of Blacks by private individuals, *see id.* at 387, 102 S.Ct. 3141 ("Of course, this Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more than the destruction of state-imposed civil disabilities and discriminatory punishments."). This explains why the two statutes address such varied concerns, some of which deal with private conduct like contracts and property rights, and some of which deal with state action, like protection of laws and proceedings and punishments and penalties.

Notwithstanding these rather clear pronouncements by the Supreme Court, the dissent asserts that:

> first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat[ing] the guaranties of the Civil Rights Act in the organic law of the land." *Hurd v. Hodge*, 334 U.S., at 32, 68 S.Ct. 847.... The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different than that of the Amendment itself.

Id. at 389-90, 102 S.Ct. 3141 (footnotes omitted).

> In our experience, it is the state that usually imposes punishment, etc. upon its citizens. Such was not the case, however, when the Act of 1866, the precursor to § 1981, was passed. At that time, Congress was especially concerned with prohibiting those incidents of private, racially motivated violence – the punishment, pains, or penalties – which were commonplace in the South.
>
> . . . .
>
> As my discussion, *infra,* of the history surrounding the passage of the 1866 Act reveals, the statute's original phrasing, which included the language "punishment, pains, or penalties," was directed to private conduct.

Ante, at 438 n. 1.

Although she quotes from it, Judge Moore has not provided the Supreme Court's entire explanation of the history of § 1981 in *General Building Contractors:*

> [W]e must be mindful of the "events and passions of the time" in which the law was forged. *United States v. Price,* 383 U.S. 787, 803, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). The Civil War had ended in April 1865. The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment and just two weeks before the Secretary of State certified the Amendment's ratification. On January 5, 1866, Senator Trumbull introduced the bill that would become the 1866 Act.
>
> *The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen. Most of these laws embodied*

express racial classifications and although others, such as those penalizing vagrancy, were facially neutral, Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery. Senator Trumbull summarized the paramount aims of his bill:

> "Since the abolition of slavery *the Legislatures* which have assembled in the insurrectionary *States have passed new laws* relating to the freedmen, and in nearly all the *States* they have discriminated against them. They deny them certain rights, *subject them to severe penalties,* and still impose upon them the very restrictions which were imposed upon them in consequence [of] the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment." Cong. Globe, 39th Cong, 1st Sess, 474 (1866).

. . .

Of course, this Court has found in the legislative history of the 1866 Act evidence that Congress *sought to accomplish more than the destruction of state-imposed civil disabilities and punishments.* We have held that both § 1981 and § 1982, "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Jones v. Alfred H. Mayer Co.,* 392 U.S., at 436, 88 S.Ct. 2186. . . .

Gen. Bldg. Contractors, 458 U.S. at 386-87, 102 S.Ct. 3141 (emphases added; footnotes omitted). In light of the United

States Supreme Court's interpretation of the legislative history of § 1981, the dissent's position is untenable.

Equally invalid is the rationalization that the equal benefit and like punishment clauses of § 1981(a) apply to private conduct because the 1866 Act rested only on the Thirteenth Amendment and was enacted before the Fourteenth Amendment was formally proposed. All this proves is that the Thirteenth Amendment was the *source* of Congress's *authority* for doing what it set out to do in the 1866 Act. *See* U.S. Const. amend. XIII, § 2; *The Civil Rights Cases,* 109 U.S. 3, 30, 3 S.Ct. 18, 27 L.Ed. 835 (1883) (noting that the Thirteenth Amendment authorized Congress to enact legislation abolishing the "badges and incidents of slavery"). Furthermore, the current statute has a shared history in the Thirteenth and Fourteenth Amendments. The 1866 Act was reenacted in 1870, pursuant to the Fourteenth Amendment. *See Gen. Bldg. Contractors,* 458 U.S. at 386, 102 S.Ct. 3141 ("[a]lthough the 1866 Act rested only on the Thirteenth Amendment . . . and, indeed, was enacted before the Fourteenth Amendment was formally proposed, . . . the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment" (internal quotation marks omitted)).

The dissent also cobbles together select passages from *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), and *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). The dissent's analysis works only if these quotations are divorced from their historical and immediate context. Although early interpretations of the 1866 Act took a broad view of the protections provided by the statute, *see, e.g., United States v. Rhodes,* 27 F.Cas. 785 (C.C.D.Ky.1866) (No. 16, 151)

(Supreme Court Justice Swayne, sitting by designation on Kentucky Circuit Court, upholding the constitutionality of the Civil Rights Act of 1866, interpreting the Thirteenth Amendment as conferring upon all Americans, not just former slaves, the status and rights of citizenship); *In re Turner,* 24 F.Cas. 337 (C.C.D.Md.1867) (No. 14,2470) (holding that a black child apprenticeship to her former owner after slavery was declared illegal in Maryland violated the full and equal benefit clause of the 1866 Act); *United States v. Cruikshank,* 25 F.Cas. 707 (C.C.D.La.1874) (No. 14, 897), *aff'd,* 92 U.S. 542, 23 L.Ed. 588 (1875) (Justice Bradley, stating in dictum that the 1866 Act was an example of Congress's power to "give full effect" to the Thirteenth Amendment's "bestowment of liberty"); *see generally* Comment, Sondra Hemeryck, ed., Cassandra Butts, et al, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of* 1990, 25 Harv. C.R.-C.L. L.Rev. 475, 476-86 (1990); *The Lost Causes of Section 1981,* 138 U. Pa. L.Rev. at 1218-19, this perception faded as the Supreme Court limited Congress's authority under the Thirteenth and Fourteenth Amendments to regulate private behavior. *See* Erwin Chemerinsky, Constitutional Law § 3.6 at 213 (3d ed.1997); *Reconstruction, Deconstruction and Legislative Response,* 25 Harv. C.R.-C.L. L.Rev. at 486-92; *The Lost Causes of Section 1981,* 138 U. Pa. L.Rev. at 1218-19.

In the landmark *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), the Supreme Court held that, under the Thirteenth Amendment, Congress's power was limited to banning slavery and could not be used to eliminate discrimination. *Id.* The Court also held that the Fourteenth Amendment only applies to government action and could not be a source for Congress to regulate private

behavior. *Id; see also The Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873) (stating that the purpose of the Thirteenth and Fourteenth Amendments was solely to protect former slaves). This view persisted for nearly a century. *See* Chemerinsky, § 3.6.1; *see also Hodges v. United States,* 203 U.S. 1, 19, 27 S.Ct. 6, 51 L.Ed. 65 (1906) (holding that § 1981 did not authorize a cause of action for conspiracy by whites to prevent blacks from working in a sawmill because "it was not the intent of the [Thirteenth] Amendment to denounce every act done to an individual that was wrong if done to a free man and yet justified in a condition of slavery").

Against this legal landscape, the Supreme Court was asked to decide whether § 1982 reached acts of private parties in the seminal case of *Jones v. Alfred H. Mayer Co., supra.* There a private real estate developer refused to sell or lease land or housing to African Americans. The issue in the *Jones* case was framed as whether "purely *private* discrimination, unaided by any action on the part of the government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color." *Id.* at 419, 88 S.Ct. 2186 (emphasis added).

The respondents in *Jones* argued that "the only evil Congress sought to eliminate was that of racially discriminatory laws in the former Confederate States [i.e. the Black Codes]." *Id.* at 426, 88 S.Ct. 2186. However, a majority of the Court found that the Thirty-ninth Congress intended to secure the right to purchase and lease property against interference from any source whatever, "whether governmental or private." 392 U.S. at 424, 88 S.Ct. 2186. The Court held "that § 1982 bars all racial discrimination, private as well as public, in the sale or

rental of property, and that the statute, thus, construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." *Id.* at 413, 88 S.Ct. 2186. The Court also overruled *Hodges'* holding that the Thirteenth Amendment was intended to prohibit only slavery. *Id.* at 441-43 n. 78, 88 S.Ct. 2186.

Thus, the central issue in *Jones* was whether § 1982 could be applied to private discrimination at all, because the Supreme Court had, up to that time, limited civil rights enforcement to eliminating slavery and to discriminatory state action. Further, the conduct at issue in § 1982, the sale or leasing of property, is the type of behavior in which both state and private actors are capable of engaging. Indeed, as the Supreme Court observed, the right to purchase and lease property "can be impaired as effectively by 'those who place property on the market' as by the State itself." *Id.* at 420-21, 88 S.Ct. 2186.

In *Runyon,* the principal issue was "whether a federal law, namely 42 U.S.C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes." *Id.* at 163, 96 S.Ct. 2586. The *Runyon* Court relied on its earlier decision in *Jones* to hold that the "make and enforce contracts" clause of § 1981 applies to private as well as public contracts. *Id.* at 170, 96 S.Ct. 2586. The *Runyon* court emphasized the common heritage of §§ 1981 and 1982. *Id.* Again, however, the issue before the court, the making and enforcing of a contract, like the sale or lease of property, is the kind of undertaking that private, as well as state actors are capable of performing. Thus, the *Runyon* Court's remarks should not be stretched to fit a dissimilar category of conduct.

Finally, the dissent urges a broad interpretation because § 1981 is part of a remedial statute. However, as we have stated in the past, the mere fact that a statute has a broad remedial purpose is not a *carte blanche* for a court to expand the statute to include protections not described in the statute. *Cf. Nixon v. Kent County,* 76 F.3d 1381, 1390 (6th Cir.1996) (en banc) (holding that the amendments to the Voting Rights Act did "not . . . reflect a broad and boundless 'trend' to expand the Act to protect classes not described in the Act, or to protect combinations of classes not described in the Act").

In short, the dissent's interpretation must be rejected as a facile attempt at analyzing a complex and multi-faceted statute that seeks to eliminate various forms of private discrimination and various forms of discriminatory state action.

MOORE, Circuit Judge, dissenting.

I respectfully dissent from both the majority's determination that the "full and equal benefit" clause in 42 U.S.C. § 1981 does not apply to private conduct and its conclusion with respect to the § 1983 claim that there is no genuine issue of material fact as to whether the Dillard security guard's actions were fairly attributable to the state.

I. "FULL AND EQUAL BENEFIT" CLAUSE

I begin, as I must, by examining the language of the statute. *Hudson v. Reno,* 130 F.3d 1193, 1199 (6th Cir.1997) ("A familiar canon of statutory construction is that the starting point for interpreting a statute is the language of the statute itself."). Section 1981 states:

> (a) Statement of equal rights
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> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> * * *
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981(a), (c).

I believe that the language of this statute is perfectly clear: according to subsection (c), the rights protected by subsection (a), *i.e.,* the rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property," are protected against impairment by private acts of discrimination. Subsection (c) does not state that *some* rights in the section are protected but others are not; there is no modifier limiting the word "rights" to only certain phrases in subsection (a). On my reading of the literal language of the two sections, as written and then purposefully amended by Congress, the "rights protected by this section" must, according to that phrase's natural meaning, mean all enumerated rights in

subsection (a).[1] The "full and equal benefit" clause is one of those rights.

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[1] In his concurring opinion, Judge Suhrheinrich states that my analysis of § 1981 must be incorrect because "[n]o one can seriously argue that an individual can subject another individual to unequal punishment or taxes" and that therefore the "like punishment" clause must require state action. *Supra* at 431. He argues that "[t]he only way the dissent's argument works is if one strips the language of the second and third subclauses of subsection (a) of their plain meaning." *Supra* at 433. Judge Suhrheinrich's analysis has superficial appeal because our present-day understanding of the terms "punishment," "pains," "penalties," etc., calls to mind state involvement. In our experience, it is the state that usually imposes punishment, etc. upon its citizens. Such was not the case, however, when the Act of 1866, the precursor to § 1981, was passed. At that time, Congress was especially concerned with prohibiting those incidents of private, racially motivated violence – the punishment, pains, or penalties – which were commonplace in the South. The Congress that debated the 1866 Act had before it reports that "described a pattern of private violence 'by men who announce their determination to take the law into their own hands. . . . ' This violence was not random, based on mere racial animosity, but frequently was aimed at preventing the Freedmen from exercising their new rights. . . . " *Barry Sullivan, Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981,* 98 Yale L.J. 541, 553 (1989) (footnote omitted). Indeed, the 1866 Act "was proposed and finally adopted against [a] background of restrictive laws, private discrimination, and violence." *Barry L. Refsin, The Lost Clauses of Section 1981: A Source of Greater Protection After* Patterson v. McLean Credit Union, 138 U. Pa. L.Rev. 1209, 1217 (1990).

As my discussion, *infra,* of the history surrounding the passage of the 1866 Act reveals, the statute's original phrasing, which included the language "punishment, pains, and penalties," was directed to private conduct. While later language, including the phrase "taxes, licenses, and exactions," which was added in 1870, may indeed refer primarily to state action, this would only mean that the "like punishment" clause may be invoked by either private *or* state action, depending on which explicit guarantee of equal treatment is implicated. Indeed, I believe the 1870 language was added to *expand* the protections of the "like punishment" clause, not to minimize them. In any case, I do not believe

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The majority contends that the statute is unambiguous and that it is clear that the word "rights" means only certain rights. According to the majority, "[i]mplicit in the concept of 'full and equal benefit of all laws and proceedings for the security of persons and property' is state action." *Supra* at 420. I believe the majority's analysis is inherently flawed. First, the majority does not interpret the plain language of the statute, as it should; instead, the majority admittedly imputes meaning to the language when it looks to what is "implicit" in the phrase "full and equal benefit of all laws." The majority states that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Supra* at 421. Because the majority insists on assigning its own meaning to the statute's language, the majority is compelled to segregate awkwardly certain phrases in subsection (a) from the application of the language in subsection (c). Thus, on the majority's reading, only one of the enumerated rights in subsection (a), the right to make and enforce contracts, may be violated by a private act of discrimination while the other enumerated rights may not. I discern no basis in the statute's language for such a strained, unnatural reading of the statute. *Cf. Franceschi v. Hyatt Corp.*, 782 F.Supp. 712, 718-19 (D.P.R.) ("We will not adhere to the dubious and illogical position that the first half of § 1981 does not have a state action requirement while the second does."). Indeed, I believe that, had Congress intended to cramp the meaning of the word

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that possible ambiguity surrounding the "like punishment" clause detracts from my argument that the "full and equal benefit" clause may be invoked by public *and* private conduct, as it is incontestible [sic] that this language has been present in the statute since its inception.

"rights," it easily could have done so when it amended the statute and added subsection (c). As noted above, however, Congress included no such limiting language in the statute. The majority claims that Chapman's reading of the statute is internally inconsistent. As the preceding discussion reveals, I believe it is the majority that must engage in interpretive contortions to arrive at its desired result.

Second, I disagree with the substance of the majority and the concurrence's assertion that the full and equal benefit clause requires state action because "[o]nly the state can prescribe laws, and [therefore] only the state can *deprive* an individual of the benefit of those laws." *Supra* at 431. I accept the concurrence's quotidian premise, but I reject its conclusion as logically flawed. Although the state does make the law, one private actor may deprive another of the full and equal benefit of those laws just as readily as a state actor, as when the state provides for equal access to public facilities by law and private persons design to deny racial minorities access to such places through intimidation, or when a private actor subjects another to a physical attack which was racially inspired.

Tellingly, the only support the majority can muster for its assessment that "the full and equal benefit clause of subsection (a) can only refer to state action," *supra* at 421, is a Third Circuit decision, *Mahone v. Waddle,* 564 F.2d 1018 (3d Cir.1977), authored before the 1991 amendments adding the language in subsection (c). Left unstated by the majority is the fact that neither the Supreme Court nor this court has ever limited the application of subsection (c) to the "make and enforce contracts" clause in subsection (a). While it is true that the "make and enforce contracts" clause is the most litigated clause of the statute, none of the other enumerated rights have been read out of the

statute by the Supreme Court. With no legal authority to guide it, the majority would have done well to err on the side of caution by giving the words of subsection (c) their "ordinary, contemporary, common meaning." *Hudson,* 130 F.3d at 1199 (citing *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)). Instead, the majority's conclusion that the word "rights" in subsection (c) refers only to the rights to make and enforce a contract places an undue restriction upon the language of the statute which is not dictated or even suggested by our precedent.

The majority also claims that Chapman's reading of the statute produces "the absurd result of federalizing state tort law." *Supra* at 421. First, I believe the majority misuses the doctrine of statutory interpretation which obliges a reviewing court to eschew the literal language of a statute when it produces an absurd result. *See United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.") (internal quotation omitted). A result is not absurd merely because it does not comport with the reviewing court's notion of what constitutes good policy. We typically embark upon the exceptional task of divining Congress's intent outside the literal language of the statute only when the statute produces a result, not which we dislike, but which is patently illogical or contrary to Congress's intent.

Second, the majority has failed to consider adequately the limiting language surrounding the "full and equal

benefit" clause which serves to cabin both the number and nature of claims that may be brought under this clause. Of course "we should be and are 'reluctant to federalize' matters traditionally covered by state common law." *Patterson v. McLean Credit Union,* 491 U.S. 164, 183, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (internal quotation omitted). The clause at issue, however, may only be invoked when one party denies another the "full and equal benefit of all laws and proceedings for *the security of persons and property* as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (emphasis added). The "security of persons and property" clause clearly limits the potential class of cases which may be brought under this section. A litigant must demonstrate that he or she was either denied the benefit of a law or proceeding that protected a cognizable property right or that involved a claim of personal security.[2] Moreover, to bring successfully a § 1981 claim, a litigant must prove intentional discrimination on the basis of race, which involves a high threshold of proof. Because of these significant limitations, I do not believe that the proper reading of the statute makes actionable a wide swath of conduct traditionally covered by state

[2] Several cases that have allowed "full and equal benefit" claims to go forward without state action have involved serious threats to a person's security in the form of physical violence. *See, e.g., Carey v. Rudeseal,* 703 F.Supp. 929, 930 n. 1 (N.D.Ga.1988) (noting that court had allowed "full and equal benefit" claim against private actor involved in Ku Klux Klan incident because § 1981 "provides a cause of action against private individuals for racially-motivated, intentionally-inflicted injury and does not require state action in the deprivation of rights"); *Hawk v. Perillo,* 642 F.Supp. 380, 386-87, 390 (N.D.Ill.1986) (construing language and history of statute to allow claim against private individual who engaged in vicious beating of plaintiffs motivated by racial animus).

common law, nor do I foresee a flood of litigation in the federal courts.[3]

The majority's analysis is neither borne out by the language nor the legislative history of this statute. There is nothing in the legislative history of the 1991 amendments that gives me reason to believe that the word "rights" has a meaning less robust than a natural reading of the word would permit. The majority asserts that "[t]he legislative history reflects that in adding subsection (c) to the statute, Congress merely codified *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), which held that § 1981's contract clause applied to private entities." *Supra* at 421. I find the legislative history remarkable only for the paucity of commentary on subsection (c). Of the two House Committee Reports on the Civil Rights Act of 1991, only one even mentions subsection (c) and that discussion is terse. The House Judiciary Committee authored H.R. Report No. 102-40(II), which states not only that Congress intended to codify *Runyon* but also that Congress intended subsection (c) "to prohibit racial discrimination in all contracts, both public and private." H.R.Rep. No. 102-40(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731. I do not believe that Congress's failure to discuss the application of subsection (c) to the

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[3] Moreover, I note that the argument that Chapman's reading of the statute would improperly federalize state tort law was once embraced by the Supreme Court in *Patterson,* 491 U.S. at 183, 109 S.Ct. 2363, as support for the Court's decision that the "make and enforce contracts" clause did not cover claims of employment discrimination involving anything more than the formation of a contract, a decision which was then legislatively overruled by Congress in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981(b).

other rights enumerated in subsection (a) may properly give rise to the narrow meaning ascribed to the word "rights" by the majority, especially in light of the broad language Congress employed in subsection (c). Congress's failure to comment upon statutory language does not offer a reviewing court *carte blanche* to rewrite the statute to fit its own subjective understanding of Congress's unstated intent.[4] Moreover, I note that the majority ignores the committee's stated purpose in drafting the 1991 amendment: "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." H.R.Rep. No. 102-40(II), at 1, *reprinted in* 1991 U.S.C.C.A.N. at 694.

Finally, I believe that the majority's analysis fails to account for § 1981's constitutional legacy. Present-day civil rights statute 42 U.S.C. § 1981 is derived from § 1 of the Civil Rights Act of 1866 ("1866 Act"), ch. 31, § 1, 14 Stat. 27.[5] *See General Bldg. Contractors Ass'n v. Penn.*, 458 U.S.

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[4] Judge Suhrheinrich believes that "Congress did not need to explain that the equal benefit and like punishment clauses of subsection (a) do not apply to private conduct *because they logically cannot.*" *Supra* at 433. I have already explained why I believe that Judge Suhrheinrich's logic is flawed: first, there is nothing in either the language or statutory history of § 1981 that restricts the "equal benefit" clause to state action, notwithstanding Judge Suhrheinrich's claims to the contrary; and second, his analysis of the "like punishment" clause ignores the historical context from which § 1981 derives.

[5] Section 1 of the Civil Rights Act of 1866 provided:

> [C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell,

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375, 384, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982). Congress passed the 1866 Act during the Reconstruction Era pursuant to its power under § 2 of the then recently ratified Thirteenth Amendment to the Constitution,[6] which does not require state action, "to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation." *Runyon,* 427 U.S. at 170, 96 S.Ct. 2586 (quoting *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 440, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968)); *accord Watson v. Fraternal Order of Eagles,* 915 F.2d 235, 241 (6th Cir.1990) ("Congress enacted § 1981 pursuant to the Thirteenth Amendment . . . to ensure that

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> hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. 42 U.S.C. § 1982 also derives from the Civil Rights Act of 1866 and was recodified in § 18 of the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144. The current statute provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

[6] The Thirteenth Amendment, which was ratified on Dec. 18, 1865, provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Under the second section of the Amendment, Congress is granted the "power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2. Less than three weeks after the passage of the Amendment, the bill that was to become the Civil Rights Act of 1866 was introduced. *See Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 713-14, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

all of the badges and incidents of slavery faded into an ignominious past."). Section 1 of the 1866 Act was substantially reenacted[7] at § 16 of the Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144, which was passed pursuant to the Fourteenth Amendment and applies only to state action.[8] Section 1 of the 1866 Act and § 16 of the 1870 Act were later recodified in § 1977 of the Revised Statutes of 1874 and ultimately recodified in 42 U.S.C. § 1981. *Id.* at 385, 102 S.Ct. 3141. The 1866 Act, when first enacted, clearly applied to private conduct.

According to the Supreme Court, the scope of the 1866 Act was not altered when it was reenacted in 1870 pursuant to the Fourteenth Amendment, despite the fact that "some members of Congress supported the Fourteenth

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[7] According to the Supreme Court, "[s]ection 16 differed from § 1 of the 1866 Act in at least two respects. First, where § 1 of the 1866 Act extended its guarantees to 'citizens, of every race and color,' § 16 of the 1870 Act – and § 1981 – protects 'all persons.' Second, the 1870 Act omitted language contained in the 1866 Act, and eventually codified as § 1982, guaranteeing property rights equivalent to those enjoyed by white citizens." *General Bldg. Contractors,* 458 U.S. at 385-86, 102 S.Ct. 3141 (internal citation omitted). The entire 1866 Act was also reenacted in § 18 of the Act of 1870, ch. 114, § 18, 16 Stat. 140. *Id.* at 386 n. 11, 102 S.Ct. 3141.

[8] The Fourteenth Amendment was sent to the states for ratification just two months after passage of the 1866 Act, and was ratified in 1868. Many who supported passage of the Fourteenth Amendment viewed it as the constitutionalization of the 1866 Act. *See Jett,* 491 U.S. at 722, 109 S.Ct. 2702. The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act [of 1866] as applied to the States." *Jones,* 392 U.S. at 436, 88 S.Ct. 2186 (internal quotation omitted). Moreover, the Court has rejected the idea that the adoption of the Fourteenth Amendment or the reenactment of the 1866 Act "were meant somehow to limit the statute's application to state action." *Id.; accord General Bldg. Contractors,* 458 U.S. at 387-88, 102 S.Ct. 3141.

The Supreme Court has repeatedly remarked upon the evidence of private discrimination that motivated the original statute's drafters. In *Jones v. Alfred H. Mayer Co.,* the Supreme Court, in discussing why the 1866 Act was passed, noted that Congress had before it evidence of pervasive private discrimination and racial violence, as well as the fact of the southern states' recently-enacted Black Codes:

> [T]he same Congress that wanted to do away with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation. 'Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced' to show that 'private outrage and atrocity' were 'daily inflicted on freedmen. . . . ' The congressional debates are replete with references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.

Jones, 392 U.S. at 427-28, 88 S.Ct. 2186 (internal citations and footnotes omitted). The Supreme Court rejected the suggestion that the 1866 Act was passed exclusively in response to restrictive state laws, noting that "the Civil Rights Act was drafted to apply throughout the country, and its language was far broader than would have been necessary to strike down discriminatory statutes." *Id.* at 426-27, 88 S.Ct. 2186. In *Jones,* the Supreme Court held that because 42 U.S.C. § 1982, a sister statute to § 1981, was derived from § 1 of the Civil Rights Act of 1866 and the Act was passed pursuant to the Thirteenth Amendment, § 1982 must reach private acts of racial discrimination. *See Jones,* 392 U.S. at 436, 88 S.Ct. 2186 (noting that "[i]n light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein. . . . ").

Thereafter, in *Runyon v. McCrary,* the Supreme Court affirmed that § 1981 prohibits racial discrimination in the making and enforcement of private contracts by private actors. *Runyon v. McCrary,* 427 U.S. 160, 168, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). The Court's holding in *Runyon* was based upon its earlier decision in *Jones.* Noting that both §§ 1981 and 1982 derive from § 1 of the 1866 Act, the Court in *Runyon* determined that there was no reason to construe the legislative history differently for § 1981 than it had for § 1982; consequently, the Court held that the "make and enforce contracts" clause of § 1981 must apply to private as well as public contracts. *See Runyon,* 427 U.S. at 170-71, 96 S.Ct. 2586.

Reviewing the history of the 1866 Act in *General Bldg. Contractors,* Chief Justice Rehnquist noted:

> [T]his Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more than the destruction of state-imposed civil disabilities and discriminatory punishments. We have held that both § 1981 and § 1982 'prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.'

General Bldg. Contractors, 458 U.S. at 387, 102 S.Ct. 3141 (quoting *Jones,* 392 U.S. at 436, 88 S.Ct. 2186). Indeed, the Chief Justice observed that, in passing the 1866 Act, Congress "acted to protect the [newly] freedmen from intentional discrimination by those whose object was 'to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.'" *Id.* at 388, 102 S.Ct. 3141 (quoting Cong. Globe, 39th Cong., 1st Sess., 1839 (1866) (Rep.Clarke)). Clearly, then, the drafters of the 1866 Act had private as well as state-inflicted discrimination in mind when they passed the Act, from which the "full and equal benefit" clause derives verbatim.

I believe that the history of § 1981, as explicated by the Supreme Court in numerous decisions, gives rise to the inescapable conclusion that the "full and equal benefit" clause, like the "make and enforce contracts" clause and the other protections offered by the statute, does not require state action. I cannot ignore, as do the majority and the concurrence, that the 1866 Act was passed pursuant to the Thirteenth Amendment and the Congress which considered the Act had before it ample evidence of private

acts of racial discrimination against the newly emancipated slaves.[9]

Consistent with my understanding of § 1981's history, I believe the statute deserves a broad interpretation because it is part of a remedial statute. The majority's reading patently violates the canon of statutory construction that commands courts to interpret remedial statutes broadly. It does so in the name of a competing canon: that of interpreting federal statutes narrowly so as not to invade upon areas of traditional state concern. As I have already demonstrated, however, the majority's overreliance on this principle is in error, as there is no likelihood that my reading of the statute will result in a flood of litigation in federal courts that properly belongs in state court. Because I am firmly convinced that the majority's reasoning is faithful neither to the statute's language nor to its deeply-rooted constitutional origins, I dissent from Part III.A of the majority's opinion requiring state action for a cause of action under the "full and equal benefit" clause. I would reverse the district court's grant of summary judgment to Dillard on this issue.

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[9] To appreciate fully how implausible the majority and the concurrence's reasoning is, one need only turn to the original language of the 1866 Act: on their reading, we would have to believe that the first clause, the right to "make and enforce contracts," and the fifth clause, the right to inherit, purchase, lease, sell, hold, and convey real and personal property, would apply to private conduct, while the second, third, fourth, sixth and seventh clauses would not. *See supra* note 5 for text of Act. I cannot believe that the Congress that enacted the 1866 Act meant to create such an interpretive labyrinth.

II. STATE ACTION

As an alternative to her § 1981 claim that Dillard denied her the "full and equal benefit" of the law, Chapman also seeks relief under 42 U.S.C. § 1983 for alleged violations of her right to be free from unreasonable searches and seizures under the Fourth Amendment and her due process rights under the Fifth Amendment. As the majority noted, a litigant bringing a claim under § 1983 must show that her rights were violated under color of state law. *See* 42 U.S.C. § 1983. The majority affirmed the district court's grant of summary judgment on this claim to Dillard. I believe that there is a genuine issue of material fact as to whether the Dillard security guard's actions may "be fairly attributed to the state." *Lansing v. City of Memphis,* 202 F.3d 821, 828 (6th Cir.2000); *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir.1992). Therefore, I respectfully dissent from Part III.B of the majority's opinion as well.

The majority has correctly identified the legal standard for evaluating whether the acts of an off-duty police officer serving as a security guard may be deemed state action. As we have noted, "[t]he fact that a police officer is on or off duty, or in or out of uniform is not controlling. It is the nature of the act performed . . . which determines whether the officer has acted under color of law." *Stengel v. Belcher,* 522 F.2d 438, 441 (6th Cir.1975) (internal quotation omitted). Thus, my analysis turns primarily on whether the officer was acting pursuant to his official duty or a police department policy. *See Layne v. Sampley,* 627 F.2d 12, 13 (6th Cir.1980) (holding that officer who shot plaintiff while officer was off-duty acted under color of state law because officer's authority to carry weapon derived from his status as police officer, conflict between

officer and plaintiff arose out of officer's official duties, and plaintiff threatened officer in officer's official capacity); *Stengel,* 522 F.2d at 441 (concluding that off-duty police officer who shot and killed two men and paralyzed a third in a barroom brawl acted under color of law because mace spray used by officer was issued by police department, and officer carried his pistol and intervened in dispute pursuant to department regulations). The majority has failed, however, to examine closely the record in this case to analyze whether there is a genuine issue of material fact to support Chapman's claim. Instead, the majority's analysis merely asserts:

> [T]he Dillard security guard who stopped and searched Chapman was an off-duty sheriff's deputy, wearing his official sheriff's department uniform, badge, and sidearm. He briefly stopped and searched Chapman, but did not arrest or threaten to arrest her, nor did he contact the sheriff's department. Under the circumstances of this case, the off-duty deputy did not act pursuant to his official duties and thus did not engage in state action.

Supra at 429.

Although in certain circumstances "it is possible to determine the question whether a person acted under color of state law as a matter of law, there may remain in some instances unanswered questions of fact regarding the proper characterization of the actions for the jury to decide." *Layne,* 627 F.2d at 13 (internal citations and quotations omitted). Based on my review of the record, I am convinced that Chapman has alleged sufficient facts to

establish a genuine issue as to whether the security guard's actions satisfy the nexus test.[10] The nexus test requires a sufficiently close relationship between the state and the private actor so that the action taken by the latter may be fairly attributed to the state itself. *See Wolotsky,* 960 F.2d at 1335; *see also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 121 S.Ct. 924, 930, 148 L.Ed.2d 807 (2001) (noting that a challenged activity may be state action "when it is entwined with governmental policies or when government is entwined in [its] management or control.") (internal quotation omitted).

In this case, the Dillard security guard was obligated to obey Dillard's policies and regulations, which are developed by the corporation, while he was on-duty at the store. J.A. at 150 (Dillard's Rules and Procedures for Security Personnel). The state played no part in the promulgation of these policies. The policy does, however, directly implicate the state in one of its provisions. This provision, which offers the store's policy on strip-searching[11] customers suspected of shoplifting, provides:

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[10] I agree with the majority that Chapman has alleged no facts to support a finding of state action under the public function test. *See Wolotsky,* 960 F.2d at 1335 (noting that public functions traditionally reserved to the state include holding elections or power of eminent domain).

[11] For the purposes of explaining the relationship between the store's policy and Chapman's claim, I must elaborate upon the majority's recitation of the facts. The majority states only that the female manager "searched Chapman's clothing." *See supra* at 419. Chapman alleges, however, and it is not disputed, that she was asked to remove her coat and her suit jacket, and to pull her blouse up over her head before the manager was satisfied that she had not stolen any merchandise. Although

(Continued on following page)

"Strip searches are prohibited. If you suspect that stolen objects are hidden on [the shopper's] person, call the police." J.A. at 150.

According to the deposition testimony of Angelo Malena, senior security officer at Dillard and a police officer for the city of Cleveland, a security guard working at the Dillard at issue in this case cannot strictly comply with this corporate policy because, as he observed, "I guess we got to call ourselves, because we are the police." J.A. at 262 (Malena Test.). Malena testified that he informed Dillard's management of the conflict in the provision, but "they said, well, this came from the corporate, so it is a generalization of Dillard's policy throughout the country." J.A. at 262.

As the majority correctly noted, the Dillard security guard did not represent himself as a police officer, threaten to arrest Chapman, wave his badge or weapons, or establish any contact with the sheriff's department during the incident. The incident at issue in this case does, however, include the moment when Chapman was asked by the security guard to enter a fitting room with the sales manager to inspect her clothing. According to Dillard's official corporate policy, the security guard should have called the police at this point because he knew that the search involved the removal of Chapman's clothing. However, as Malena noted, the security officer cannot call

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Dillard's policy does not define strip-searching, I believe that, because Chapman was forced to remove clothing, she was strip-searched by the Dillard's store manager, at the direction of the security guard.

the police pursuant to the policy because the security guard *is* the police.

Although the majority states that "the security guard in this case did not perform or seek to perform his official duties as a sheriff's deputy," *supra* at 429, I believe there is a genuine issue of material fact as to whether, at the moment the security guard was required to seek the assistance of the police, that is, when the guard asked Chapman to enter the fitting room with the sales manager so that Chapman's clothes and person could be searched, the security guard became a state actor under the corporate policy. Because the majority failed to consider these facts, I believe that the majority's analysis is flawed and that summary judgment is inappropriate. I would reverse the district court's judgment on this issue as well.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LYNETTE CHAPMAN, Plaintiff, v. THE HIGBEE COMPANY, Defendant	)	CASE NO. 1:98CV423 MAGISTRATE JUDGE HEMANN ORDER (Filed Aug. 9, 1999)

On June 29, 1999 this court granted defendant's motion for summary judgment. On July 9 plaintiff moved for leave to file a response to defendant's reply brief and motion for leave to file motion for reconsideration. On July 19 the court [sic] plaintiff's request to file a surreply brief. On July 28 plaintiff filed a Response to Defendant's Reply Memorandum and, in the Alternative, Motion for Reconsideration. On August 5 defendant filed a Motion to Strike plaintiff's submission to the extent plaintiff sought reconsideration of the court's order of June 29 because this court had granted leave for such filing. Defendant further replied to plaintiff's surreply brief on the merits.

Plaintiff's surreply brief is based on the argument that 42 U.S.C. § 1981(c) contradicts this court's holding that actions against private individuals are limited to the "make and enforce contracts" clause of § 1981(a) and do not extend to the "full and equal benefits" clause. The court has turned to caselaw and to legislative history to review this argument. Based primarily on legislative history this court concludes that § 1981(c) was not added in 1991 to expand the right of private action

beyond the "make and enforce contracts" clause. It was added to overrule the Supreme Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and affirm the Court's ruling in *Runyon v. McCrary*, 427 U.S. 160 (1976).

Further the court disagrees that plaintiff has shown state action on the part of defendant to make out a claim under 42 U.S.C. § 1983.

Defendant's motion to strike is overruled as to the filing of the surreply brief but granted as to the motion for reconsideration. The court reaffirms its prior decision.

IT IS SO ORDERED.

Dated: August 9, 1999

/s/ Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LYNETTE CHAPMAN,	CASE NO. 1:98CV423
Plaintiff,	MAGISTRATE JUDGE HEMANN
v.	
THE HIGBEE COMPANY,	AMENDED MEMORANDUM AND OPINION
Defendant	(Filed July 23, 1999)

This matter is before the court on consent of the parties. Pending is defendant's motion for summary judgment. For the reasons set forth below, the motion is granted.[1]

I.

Plaintiff, Lynette Chapman ("Chapman"), commenced this action against The Higbee Company (now Dillard Department Stores, Inc. ("Dillards"), alleging violations of 42 U.S.C. §§ 1981 and 1983. The case arises out of an incident which occurred at Dillards on February 20, 1997. The facts, construed in favor of plaintiff as they must be at this stage of the litigation, are as follows.

[1] The Amendment to this Memorandum and Opinion correct typographical errors on pages one and six of the original Memorandum and Opinion and do not effect any substantive change.

On February 20, 1997 Chapman went to Dillards to look for shoes for her husband. Finding none which were satisfactory, she then decided to "look around" the women's clothing department. In the course of browsing, Chapman chose two suits and a blouse to try on. During the browsing process, she was offered assistance by at least two sales assistants. Eventually Chapman requested, and was directed to, a fitting room. A white woman had just exited the fitting room to which Chapman was directed. When Chapman entered the fitting room, she noticed clothing on the hooks and a sensor tag (a "kno-go") lying on the floor. Chapman attempted to notify a sales assistant about the clothes and sensor but could not locate one. Chapman decided not to purchase any of the items, hung them back on the hanger and returned them to the appropriate departments. At no time did she mention to a sales assistant that she had seen a sensor on the floor.

When an assistant entered the fitting room to retrieve clothes which had been left by the previous shopper, she noticed the sensor and alerted security. Chapman was stopped by a Dillard's security guard. According to Chapman, she followed the security guard back to the fitting room area where he and a female manager checked her purse and a female manager searched her clothing. Finding nothing, the manager apologized to Chapman, Chapman left the store. Even though Chapman pointed out the white woman who had been in the fitting room prior to her, that woman was not detained.

Based upon the above set of facts, plaintiff filed a state court action asserting state claims and this action asserting violations pursuant to 42 U.S.C. §§ 1981 and 1983. Defendant moves to dismiss both of the federal

claims, arguing that under the facts set forth above plaintiff cannot prevail.

II.

Summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The moving party must demonstrate to the court through reference to pleadings and discovery responses the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. In this way summary judgment can be used to dispose of claims and defenses which are factually unsupported. *Id.* at 324. The burden on the nonmoving party is to show, through the use of evidentiary materials, the existence of a material fact which must be tried. *Id.* The court's inquiry at the summary judgment stage is "the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250. The court's treatment of facts and inferences in a light favorable to the nonmoving party does not relieve that party of its obligation "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. at 324. The nonmoving party must oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves. . . ." *Id.* A

scintilla of evidence in favor of the nonmoving party is not sufficient. The issue which the court must determine is whether there is evidence on which a jury could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

III.

Defendant argues that plaintiff does not have a cause of action under § 1981 because she and Dillards were not engaged in the making or enforcement of a contract. Chapman argues that Dillards construes § 1981 too narrowly and that the statute provides a cause of action outside of a contractual relationship. The court disagrees.

Section 1981 reads as follows:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges,

terms and conditions of the contractual relationship.[2]

Plaintiff is not relying upon the "make and enforce contracts" portion of the statute. Instead she argues that Dillards infringed upon her rights "to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" (the "full and equal benefit clause"). The legal issue squarely presented by the parties is whether the full and equal benefit clause applies to actions by private as well as state entities. Agreeing with the majority of courts which have decided this issue, this court determines that the full and equal benefit clause extends only to the state action.[3]

In *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied sub nom. Pittsburgh v. Mahone*, 438 U.S. 904 (1978), the court correctly concluded that the rights assured by § 1981 extend beyond the contract clause. To read the statute differently would be to render a significant portion of it superfluous. On the other hand, the court reasoned, the statute cannot be read so broadly as to create a general federal tort statute which would create "a section 1981 action in federal court whenever a white man strikes a black in a barroom brawl." *Id.* at 1029. The court

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[2] This paragraph was added as a result of section 101 of the Civil Rights Act of 1991, which expanded the scope of the legislation beyond limitations imposed by the Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (19___).

[3] The issue of whether there was "state action" on the part of Dillards' security guard is reserved for Part IV of this opinion.

recognized a "fundamental difference" between the contracts clause and the full and equal benefits clause:

> The right "to make and enforce contracts" necessarily is concerned with relations between private individuals. It is usually with another individual, not the state, that a black person would seek to make a contract; it is the other individual's racially motivated refusal to make a contract which can cause harm to the black person. The right "to make and enforce contracts can thus be infringed by private individuals and it is appropriate that private individuals be held liable for that infringement.

Id. The unambiguous language of the statute, however, requires a different reading as to the "full and equal benefit clause":

> The words "full and equal benefit of all *laws* and *proceedings* for the security of persons and property" (emphasis supplied), on the other hand, suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state action through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law.

Id.

The *Mahone* court reasoning has been adopted by various courts. *See, e.g., Brooks v. American Broadcasting Cos., Inc.*, 737 F. Supp. 431 (N.D. Ohio 1990), affirmed in part and vacated in part on other grounds, 932 F.2d 495 (1991); *Provincial Government of the Republic of New Afrika v. American Broadcasting Cos., Inc.*, 609 F. Supp.

104 (D.C.D.C. 1985); *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F. Supp. 1344 (E.D. Va. 1983). In *Spencer v. Casavilla*, 839 F. Supp. 1014, 1019 (S.D.N.Y. 1993), the court cautioned against turning § 1981 into a federal cause of action for the violation of state law:

> Extending the "equal benefit" clause to private conduct would have the effect of federalizing all racially-motivated state-law torts that implicate "the security of persons and property."
>
> * * *
>
> The Court noted in *Patterson v. McLean Credit Union*, that "[a]lthough we must do so when Congress plainly directs, as a rule we should be and are 'reluctant to federalize' matters traditionally covered by state common law." If the "equal benefit" clause of § 1981 were extended in this case to reach private action, the court sees no limiting principle to prevent its becoming the "general federal tort law" the Supreme Court has expressly rejected.

(Citations omitted.)

Here plaintiff is pursuing her state court remedies (false arrest, negligence, race discrimination and false imprisonment) in state court. Unless the court concludes that there was state action involved in this incident, the claims Chapman raises under § 1981 are, indeed, state law claims. Plaintiff's remedy is not with § 1981 but with state law.

Defendant's motion for summary judgment on the § 1981 claim is granted to the extent it is asserted against a private entity.

IV.

Chapman asserts a claim pursuant to 42 U.S.C. § 1983, arguing that Dillards' security guard was acting under color of state law at the time of the incident. Plaintiff points to the fact that the security guard was a member of a part-time security force comprised of certified city police and county sheriff deputies and that while at work, the security guard was required to wear his uniform and badge and carry weapons. Chapman admits that the guard was an employee of Dillards, paid by Dillards, under its control at all times and not serving as a deputy or city police officer. Defendant moves for dismissal of the § 1983 claim on the basis that defendant was not acting under color of state law.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court articulated the two-part test for determining when conduct of a party can be attributed to the state: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." The Sixth Circuit looks to three tests to determine whether private conduct can be attributable to the state: 1) the public function test, 2) the state compulsion test and 3) the nexus test. *Ellison v. Garbarino*, 48 F.3d 192 (6th Cir. 1995). Plaintiff meets none of those tests under these facts.

Under the public function test the private actor must be performing a function usually reserved to the state. "The typical examples are running elections or eminent domain." *Id.* at 195. There can be no suggestion here that the action of the security guard in watching for shoplifters in a private department store is one usually reserved for the State. The security guard was not proceeding pursuant to any policy formulated by the state but, rather, by one formulated by Dillards. "The simple fact that a private entity performs a function that serves the public does not transform its conduct into state action." *Wade v. Byles*, 83 F.3d 902, 902 [sic] (7th Cir. 1996), *citing Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

> A merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. Experience teaches that the prime responsibility for protection of personal property remains with the individual. A storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism. Such action cannot logically be attributed to the state.

White v. Scrivner Corp., 594 F.2d 140, 142 (5th Cir. 1979).

Under the state compulsion test the plaintiff must show that the action taken by the private entity was encouraged or coerced by the State such that the choice to take the action was made by the state. *Ellison*, 48 F.3d at 195. The plaintiff does not suggest that the security guard stopped her because of some kind of mandate from the state. In fact, she states that at all times his actions were under the control of Dillards. Absent some direction from the state to act, a shopkeeper who simply utilizes a statute

permitting it to detain a suspected shoplifter cannot be deemed to act for the state. *Id.* at 143.

The nexus test looks to the relationship between the state and the private actor to see whether that relationship is close enough to deem the action to be that of the state. *Ellison*, 48 F.3d at 195. The court looks to whether there is state regulation of the private entity or a contractual relationship between the state and the private entity which creates such a nexus. Here there is no relationship between the state and Dillards. Dillards hired, paid and controlled its security officers. While the officers wore uniforms and badges and carried weapons, there is no allegation that the security officer represented himself as a police officer, threatened to arrest the plaintiff, waved his badge or weapons or established any contract with city police during the incident. Plaintiff was never arrested and thus there is no evidence of a relationship between the security guard and Dillards which would lead one to conclude that there was collusion between the state and the store or a preconceived plan of action. *Cf. Abraham v. Raso*, 15 F. Supp. 2d 433, 442 (D.N.J. 1998) ("Thus, police officers working as private security guards often will be found to be acting under color of state law where they identify themselves as police officers, wear their police uniforms, flash their badges, threaten to use power conveyed upon them by their status as police officers in order to make arrests, call in other officers, drive police cars, take actions consistent with municipal or state regulations governing police, etc.")

Under the analysis set forth above, this court concludes that defendant cannot be deemed a state actor in this case. Thus plaintiff's claims fail under both 42 U.S.C. §§ 1981 and 1983.

IV. [sic]

For the above stated reasons, defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

Dated: July 23, 1999

/s/ Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LYNETTE CHAPMAN,	)	CASE NO. 1:98CV423
Plaintiff,	)	
	)	MAGISTRATE JUDGE
vs.	)	HEMANN
THE HIGBEE COMPANY,	)	JUDGMENT ENTRY
Defendant.	)	(Filed Jun. 30, 1999)

Pursuant to the court's Memorandum and Opinion filed June 29, 1999, the magistrate judge grants the Motion of Summary Judgment of Defendant The Higbee Company.

Date: 6/30/99

/s/ Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LYNETTE CHAPMAN, Plaintiff, v. THE HIGBEE COMPANY, Defendant.	CASE NO. 1:98CV423 MAGISTRATE JUDGE HEMANN MEMORANDUM AND OPINION (Filed Jun. 29, 1999)

This matter is before the court on consent of the parties. Pending is defendant's motion for summary judgment. For the reasons set forth below, the motion is granted.

I.

Plaintiff, Lynette Chapman ("Chapman"), commenced this action against The Higbee Company (now Dillard Department Stores, Inc. ("Dillard's"), alleging violations of 42 U.S.C. §§ 1981 and 1983. The case arises out of an incident which allegedly occurred at Dillard's on February 20, 1997. The facts, construed in favor of plaintiff as they must be at this stage of the litigation, are as follows.

On February 20, 1997 Chapman went to Dillard's to look for shoes for her husband. Finding none which were satisfactory, she then decided to "look around" the women's clothing department. In the course of browsing, Chapman chose two suits and a blouse to try on. During the browsing process, she was offered assistance by at least two sales assistants. Eventually Chapman requested,

and was directed to, a fitting room. A white woman had just exited the fitting room to which Chapman was directed. When Chapman entered the fitting room, she noticed clothing on the hooks and a sensor tag (a "kno-go") lying on the floor. Chapman attempted to notify a sales assistant about the clothes and sensor but could not locate one. Chapman decided not to purchase any of the items, hung them back on the hangar and returned them to the appropriate departments. At no time did she mention to a sales assistant that she had seen a sensor on the floor.

When an assistant entered the fitting room to retrieve clothes which had been left by the previous shopper, she noticed the sensor and alerted security. Chapman was stopped by a Dillard's security guard. According to Chapman, she followed the security guard back to the fitting room area where he and a female manager checked her purse and a female manager searched her clothing. Finding nothing, the manager apologized to Chapman, Chapman left the store. Even though Chapman pointed out the white woman who had been in the fitting room prior to her, that woman was not detained.

Based upon the above set of facts, plaintiff filed a state court action asserting state claims and this action asserting violations pursuant to 42 U.S.C. §§ 1981 and 1983. Defendant moves to dismiss both of the federal claims, arguing that under the facts set forth above plaintiff cannot prevail.

II.

Summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);

Celotex Corp. v. Catrett, 477 U. S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The moving party must demonstrate to the court through reference to pleadings and discovery responses the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. In this way summary judgment can be used to dispose of claims and defenses which are factually unsupported. *Id.* at 324. The burden on the nonmoving party is to show, through the use of evidentiary materials, the existence of a material fact which must be tried. *Id.* The court's inquiry at the summary judgment stage is "the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250. The court's treatment of facts and inferences in a light favorable to the nonmoving party does not relieve that party of its obligation "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. at 324. The nonmoving party must oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves. . . . " *Id.* A scintilla of evidence in favor of the nonmoving party is not sufficient. The issue which the court must determine is whether there is evidence on which a jury could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

III.

Defendant argues that plaintiff does not have a cause of action under § 1981 because she and Dillard's were not engaged in the making or enforcement of a contract. Chapman argues that Dillard's construes § 1981 too narrowly and that the statute provides a cause of action outside of a contractual relationship.

Section 1981 reads as follows:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.[1]

[1] This paragraph was added as a result of section 101 of the Civil Rights Act of 1991, which expanded the scope of the legislation beyond limitations imposed by the Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Plaintiff is not relying upon the "make and enforce contracts" portion of the statute. Instead she argues that Dillard's infringed upon her rights "to sue, be parties, given evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" (the "full and equal benefit clause"). The legal issue squarely presented by the parties is whether the full and equal benefit clause applies to actions by private entities. Agreeing with the majority of courts which have decided this issue, this court determines that the full and equal benefit clause extends only to state action.[2]

In *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied sub nom. Pittsburgh v. Mahone*, 438 U.S. 904 (1978), the court correctly concluded that the rights assured by § 1981 extend beyond the contracts clause. To read the statute differently would be to render a significant portion of it superfluous. On the other hand, the court reasoned, the statute cannot be read so broadly as to create a general federal tort statute which would create "a section 1981 action in federal court whenever a white man strikes a black in a barroom brawl." 564 F.2d at 1029. The court recognized a "fundamental difference" between the contracts clause and the full and equal benefit clause:

> The right "to make and enforce contracts" necessarily is concerned with relations between private individuals. It is usually with another individual, not the state, that a black person would seek to make a contract; it is that other

[2] The issue of whether there was "state action" on the part of Dillard's' security guard is reserved for Part IV of this opinion.

> individual's racially motivated refusal to make a contract which can cause harm to the black person. The right "to make and enforce contracts can thus be infringed by private individuals and it is appropriate that private individuals be held liable for that infringement.

Id. The unambiguous language of the statute, however, requires a different reading as to the "full and equal benefit clause":

> The words "full and equal benefit of all *laws* and *proceedings* for the security of persons and property" (emphasis supplied), on the other hand, suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state action through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law.

Id.

The *Mahone* court reasoning has been adopted by various courts. *See, e.g., Brooks v. American Broad. Cos., Inc.*, 737 F. Supp. 431 (N.D. Ohio 1990), affirmed in part and vacated in part on other grounds, 932 F.2d 495 (1991); *Provincial Gov't of the Republic of New Afrika v. American Broad. Cos., Inc.*, 609 F. Supp. 104 (D.C.D.C. 1985); *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F. Supp. 1344 (E.D. Va. 1983). In *Spencer v. Casavilla*, 839 F. Supp. 1014, 1019 (S.D.N.Y. 1993), the court cautioned against turning § 1981 into a federal cause of action for the violation of state law:

> Extending the "equal benefit" clause to private conduct would have the effect of federalizing all

> racially-motivated state-law torts that implicate "the security of persons and property."
>
> * * *
>
> The Court noted in *Patterson v. McLean Credit Union*, that "[a]lthough we must do so when Congress plainly directs, as a rule we should be and are 'reluctant to federalize' matters traditionally covered by state common law." If the "equal benefit" clause of § 1981 were extended in this case to reach private action, the court sees no limiting principle to prevent its becoming the "general federal tort law" the Supreme Court has expressly rejected.

(Citations omitted.)

Here plaintiff is pursuing her state court remedies (false arrest, negligence, race discrimination and false imprisonment) in state court. Unless the court concludes that there was state action involved in this incident, the claims Chapman raises under § 1981 are, indeed, state law claims. Plaintiff's remedy is through § 1981 but through state law.

Plaintiff's motion for summary judgment on the § 1981 claim is granted to the extent it is asserted against a private entity.

IV.

Chapman asserts a claim pursuant to 42 U.S.C. § 1983, arguing that Dillard's security guard was acting under color of state law at the time of the incident. Plaintiff points to the fact that the security guard was a member of a part-time security force comprised of certified city police and county sheriff deputies and that while at work,

the security guard was required to wear his uniform and badge and carry weapons. Chapman admits that the guard was an employee of Dillard's, paid by Dillard's, under its control at all times and not serving as a deputy or city police officer at the time of the incident. Defendant moves for dismissal of the § 1983 claim on the basis that defendant was not acting under color of state law.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court articulated a two-part test for determining when conduct of a party can be attributed to the state: (1) "the deprivation must be caused by the exercise of some right of privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." The Sixth Circuit looks to three tests to determine whether private conduct can be attributable to the state: 1) the public function test, 2) the state compulsion test and 3) the nexus test. *Ellison v. Garbarino*, 48 F.3d 192 (6th Cir. 1995). Plaintiff meets none of those tests under these facts.

Under the public function test the private actor must be performing a function usually reserved to the state. "The typical examples are running elections or eminent domain." *Id.* at 195. There can be no suggestion here that the action of the security guard in watching for shoplifters in a private department store is one usually reserved for the state. The security guard was not proceeding pursuant to any policy formulated by the state but, rather, by one formulated by Dillard's. "The simple fact that a private

entity performs a function that serves the public does not transform its conduct into state action." *Wade v. Byles*, 83 F.3d 902, 902 (7th Cir. 1996), *citing Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). Moreover,

> [a] merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. Experience teaches that the prime responsibility for protection of personal property remains with the individual. A storekeeper's central motivation in detaining a person whom he believes to be in the act of stealing his property is self-protection, not altruism. Such action cannot logically be attributed to the state.

White v. Scrivner Corp., 594 F.2d 140, 142 (5th Cir. 1979).

Under the state compulsion test the plaintiff must show that the action taken by the private entity was encouraged or coerced by the state such that the choice to take the action was made by the state. *Ellison*, 48 F.3d at 195. The plaintiff does not suggest that the security guard stopped her because of some kind of mandate from the state. In fact, she states that at all times his actions were under the control of Dillard's. Absent some direction from the state to act, a shopkeeper who simply utilizes a statute permitting it to detain a suspected shoplifter cannot be deemed to act for the state. *White*, 594 F.2d at 143.

The nexus test looks to the relationship between the state and the private actor to see whether that relationship is close enough to deem the action to be that of the state. *Ellison*, 48 F.3d at 195. The court looks to whether there is state regulation of the private entity or a contractual relationship between the state and the private entity which creates such a nexus. Here there is no relationship

between the state and Dillard's. Dillard's hired, paid and controlled its security officers. While the officer wore a uniform and badge and carried weapons, there is no allegation that he represented himself as a police officer, threatened to arrest the plaintiff, waved his badge or weapons or established any contact with city police during the incident. Plaintiff was never arrested and thus there is no evidence of a relationship between the security guard and state officials which would lead one to conclude that there was collusion between the state and the store or a preconceived plan of action. *Cf. Abraham v. Raso*, 15 F. Supp. 2d 433, 442 (D.N.J. 1998) ("Thus, police officers working as private security guards often will be found to be acting under color of state law where they identify themselves as police officers, wear their police uniforms, flash their badges, threaten to use power conveyed upon them by their status as police officers in order to make arrests, call in other officers, drive police cars, take actions consistent with municipal or state regulations governing police, etc.").

Under the analysis set forth above, this court concludes that defendant cannot be deemed a state actor in this case. Thus plaintiff's claims fail under both 42 U.S.C. §§ 1981 and 1983.

V.

For the above stated reasons, defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

Dated: June 29, 1999 /s/ Patricia A. Hemann
Patricia A. Hemann
United States Magistrate
Judge

Supreme Court, U.S.
FILED
JUN 11 2003
OFFICE OF THE CLERK

No. 02-1646

IN THE

Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a
DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

DAVID R. GRANT
Counsel of Record
JOSEPH A. CONDENI
EDWARD A. ICOVE
SMITH AND CONDENI CO., L.P.A.
1801 East 9th Street, Suite 900
Cleveland, OH 44114
(216) 771-1760

Attorneys for Respondent

181271

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REASONS FOR DENYING THE WRIT

COUNTER-STATEMENT OF THE CASE

No compelling reasons exist to grant Dillard's petition for a writ of Certiorari. The sole argument of Dillard's Petition for Writ of Certiorari is its assertion that the Sixth Circuit's en banc decision is "in direct conflict with the Third, Fourth, and Eighth Circuits" and that this Court "should grant certiorari to resolve this decisional conflict." (Pet. at pp. 3 and 4). Even a cursory review of the decisions from the Third, Fourth, and Eighth Circuits, however, reveals that the only authorities and support for those seemingly contrary decisions were based upon a fundamentally different version of the statute at issue in this case.

For that reason, Respondent Lynette Chapman ("Chapman") submits that a sound conflict does not exist among the district or circuit courts and that the Sixth Circuit's en banc ruling (like the Second District's similar ruling[1]) was proper and sound in all respects.

Moreover, there have been an extremely limited number of cases since the 1991 amendment where a court has been asked to address the question presented by Dillard's Petition (*i.e.* the scope of the "full and equal benefit" clause under the amended version of Section 1981). As a result, this case does not present a "recurring issue" nor does it appear to be causing such a dilemma for the district and circuit courts such that this Court needs to accept certiorari and provide guidance to those courts at this early juncture of the development of this area of law.

---

1. *See Phillip v. University of Rochester*, 316 F.3d 291 (2nd Cir. 2003).

Therefore, Chapman respectfully urges this Honorable Court to deny Dillard's Petition for Writ of Certiorari.

RESPONDENT'S COUNTER-STATEMENT OF THE FACTS

Chapman believes that Dillard's has misstated the facts by omitting certain matters that support Chapman's claim that she was the victim of a racially motivated, improper and unwarranted suspicion, accusation, stop and search for suspected shoplifting by Dillard's.

At the District Court level, the Court was addressing whether state action was a requirement of Section 1981 and the parties were not yet required to present all of their evidence going to the issue of whether Dilliard's actions were race-driven. Nevertheless, some of the evidence presented so far that is missing from Dillard's statement of the "Factual Background" is the fact that a female Caucasian shopper was just exiting the fitting room that Debra Hughes directed Chapman to use. That same sales associate also admitted that she observed clothes already hanging on the back of that particular fitting room's door and that she observed Chapman hang her merchandise on a different hook. After Chapman finished trying on her merchandise and exited the fitting room, a sales associate was waiting at the door to remove the Caucasian customer's merchandise that that customer had left behind. Also, during the stop and search of Chapman, Dillard's ignored and refused her repeated requests for Dillard's to also question the Caucasian shopper.

Contrary to Dillard's statement, by being stopped, questioned and searched, Chapman was clearly being accused

of the crime of shoplifting and was required to prove that she had not stolen anything before she was allowed to leave the store.

Also missing from Dillard's statement is the mention of Dillard's admission that its actions violated its own store and company-wide policies.

ARGUMENT

A. The Sixth Circuit's En Banc Decision *Does Not* Present A True Conflict Among The Courts Of Appeals

Dillard's claim that the Courts of Appeals are "sharply divided on whether the 'full and equal benefit' clause of Section 1981 applies to private actors" (Pet. at p. 15) is without merit. It is true that the Second Circuit is in agreement with the Sixth Circuit's en banc decision below and that the Third, Fourth and Eighth Circuits have *seemingly* ruled just the opposite. A closer examination of the Third, Fourth and Eighth Circuit rulings, however, reveal critical distinctions from the Sixth and Second Circuit decisions.

Relying largely on the clear language of subsection (c) of Section 1981 that was added to the statute in 1991, the Sixth Circuit ruled that "section 1981 plainly protects against impairment of its equal benefit clause [found in subsection (a)] by private discrimination and . . . there is no reason to look beyond section 1981's plain language." *Chapman v. The Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003). Pet. App. 13. The Second Circuit agreed, stating, "we believe that the 1991 amendment removes any doubt that the conduct of private

actors is actionable under the equal benefit clause of Section 1981." *Phillip v. University of Rochester*, 316 F.3d 291, 296 (2nd Cir. 2003).

1. The Third Circuit

In *apparent* contrast to the Sixth Circuit, the Third Circuit, after first noting that a claim under the "full and equal benefit" clause was not raised in the district court and was therefore not properly preserved for appeal, stated that even if that claim was considered, it "would fail in light of a substantial line of authority holding that only state actors can be sued under the 'full and equal benefit' clause of § 1981." *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3rd Cir. 2001). The "substantial line of authority" that the *Brown* case cited and was referring to was *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3rd Cir. 1977); *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 30 n.1 (D. D.C. 1999) (dictum); *Lewis v. J.C. Penny Co.*, 948 F. Supp. 367, 371 (D. Del. 1996); *Sterling v. Kazmierszak*, 983 F. Supp. 1186, 1192 (N.D. Ill. 1997). Even a very cursory review of this "authority," however, reveals the lack of any actual support for the Third Circuit's ruling.

First, *Mahone* examined the pre-1991 version of Section 1981 that contained only the language now comprising subsection (a). Nowhere in that pre-1991 version of the statute was there any of the language now found in subsection (c) that was relied upon by the Sixth (and Second) Circuit.

Similarly, the *Sheppard* decision, although dealing with the amended version of Section 1981, merely cited *Mahone* and two other district court cases as authority for its footnote statement that "[m]ost courts have held that

'the equal benefits' clause . . . requires state action." *Sheppard*, 59 F. Supp. 2d at 30 n.1. All of *Sheppard*'s authority, however, examined only the pre-1991 version of Section 1981. *Id.* Moreover, the *Sheppard* court did not even fully analyze this issue and instead stated, "it is unnecessary for this Court to rule on the defendants' second ground, i.e., whether the equal benefits clause requires state action." *Id.*

For its authority, *Lewis* likewise only cited *Mahone*, which again clearly examined and applied to the pre-1991 version of Section 1981, only. *Lewis*, 948 F. Supp. at 371.

Finally, it is unclear from *Sterling* whether it held that state action was required to establish a claim under the "full and equal benefit" clause of Section 1981 and, even if it did, it surely did not cite any post-1991 amendment cases for authority. *Sterling*, 983 F. Supp. at 1192 ("the parties did not cite and the court could not find any Seventh Circuit decisions which hold that the equal benefits clause creates a federal remedy for state tort law claims where racial animus is alleged.")

Consequently, the Third Circuit in the *Brown* decision, just like all three of the district courts it cited as its authority, failed to explain the fatal distinction between the respective versions of the statute being examined in those cases and failed to justify the continued validity of that authority in light of the clear language to the contrary that is found in the amended statute.

As a result, the reasoning, basis and authority for the Third Circuit's decision is questionable, to say the least, and on closer examination does not present a true, direct or sharp conflict with the Sixth (and Second) Circuit.

2. The Fourth Circuit

Contrary to Dillard's assertion, the Fourth Circuit's ruling in *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *rev'd in part on other grounds*, 481 U.S. 615 (1987), is simply not in conflict with the Sixth Circuit's en banc decision at all. That is because the *Shaare Tefila Congregation* case was clearly examining the pre-1991 version of Section 1981. *Id.* Since the Sixth Circuit was examining the post-1991 version of Section 1981 and, in particular, a provision added to that statute by amendment in 1991, the Sixth Circuit's decision is not in conflict with the Fourth Circuit's decision in *Shaare Tefila Congregation*.

3. The Eighth Circuit

The Eighth Circuit has decided two cases raising the "full and equal benefit" clause found in the post-1991 version of Section 1981. The first, decided September 17, 2001, is *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002). The second, decided November 21, 2001, is *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001). The continued validity and applicability of those decisions is highly suspect.

As the Second Circuit noted, "[t]he *Youngblood* holding rests on [the panel decision in] *Chapman v. Higbee* . . . , an opinion that since has been vacated ... and on dicta in *Mahone v. Waddle* . . . , a pre-[1991] amendment case." *Phillip v. University of Rochester*, 316 F.3d at 294. The Eighth Circuit's decision in the *Adams* case suffers from the same fatal flaw in that it merely cites and relies on *Youngblood* and, in turn, *Youngblood's* quoting of the vacated panel decision

in *Chapman* and the pre-amendment case of *Mahone*. *Adams*, 271 F.3d at 777.

Since both of these decisions from the Eighth Circuit lack any analysis whatsoever as to whether state action is required in a post-1991 amendment case and instead merely rely on a case that has since been vacated and a case that interpreted a prior version of a statute, the continued validity of the Eighth Circuit rulings is negligible. This is especially true when the Eighth Circuit's decisions are compared to the Sixth Circuit en banc decision's thorough analysis of the correct version of the statute. As a result, it cannot and should not be said that the Eighth Circuit is in direct conflict with the Sixth Circuit.

Based upon the extremely limited number of Circuit decisions so far, a clear and direct conflict (much less a "sharp" division) does not exist among the Circuits at this time to provide a basis for this Court to grant Dillard's petition and accept jurisdiction to decide the issue presented by this case.

B. The Sixth Circuit's En Banc Decision Does Not Raise An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Chapman agrees with Dillard's that the scope of the post-amendment version of Section 1981 is an important issue of federal law. Dillard's claim, however, that the questions presented by its petition concern "an important and recurring issue of federal law, Section 1981's proper scope" (Pet. at pp. 6 and 15) and justify this Court granting Dillard's petition, is without merit. Chapman submits that to date, only the Sixth and Second Circuits have truly analyzed the post-amendment version of the statute and that both of those

Circuits have similarly and clearly held that its scope reaches private impairment of the "full and equal benefit" clause. Moreover, this is certainly not a "recurring issue" in light of the nearly twelve year existence of this amended version of the statute and the fact that only five circuit courts have considered this issue, of which only two have truly analyzed this issue.

As a result, the Sixth (and Second) Circuit provides a sound, concrete answer for federal courts to look to and there is no lingering, unanswered question in need of this Court's ruling.

C. The Sixth Circuit's En Banc Decision Does Not Misread The Legislative History And Does Not Lead To Internal Inconsistencies In The Statute

The Sixth Circuit's en banc decision is not "undercut by the legislative history of Section 1981(c)." (Pet. at p. 22). In citing to two of the House Committee Reports on the Civil Rights Act of 1991, Dillard's overlooks the report that stated the addition of subsection (c) was "to strengthen existing protections and remedies available under federal civil rights laws and to provide more effective deterrence and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40(II), at 1, *reprinted in* 1991 U.S.C.C.A.N. at 694. Surely this goal of Congress in enacting subsection (c) is realized and furthered by the Sixth Circuit's en banc decision.

The Sixth Circuit's decision was also not based on a misreading of the language of Section 1981. After all, one would be hard pressed to find a more *un*ambiguous statutory subsection and a more straightforward application of that clear language.

D. The Sixth Circuit's En Banc Decision was Unanimous With Respect To Chapman's Claim That Dillard's Was A State Actor

Dillard's neglects to point out in its Petition that the Sixth Circuit's en banc decision unanimously held that there *is* a question of fact as to whether Dillard's was a state actor. *Chapman*, 319 F.3d 835 (majority) and 843 (dissent). Pet. App. 17-18, 34. Dillard's does not raise this issue as one of its "Questions Presented" to this Court. Pet. p. i.

Therefore, even if a direct conflict existed among the Circuits or even if the Sixth Circuit had found (or this Court were to find) that state action is required for a claim under Section 1981's "full and equal benefit" clause, the District Court's grant of summary judgment in favor of Dillard's would still have been in error.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

DAVID R. GRANT
Counsel of Record
JOSEPH A. CONDENI
EDWARD A. ICOVE
SMITH AND CONDENI CO., L.P.A.
1801 East 9th Street, Suite 900
Cleveland, OH 44114
(216) 771-1760

Attorneys for Respondent

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No. 02-1646

In The
Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN B. LEWIS
Counsel of Record
THOMAS J. PIATAK
GREGORY V. MERSOL
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY IN SUPPORT OF CERTIORARI

In its petition for a writ of certiorari, Dillard's explained (Pet. 12-20) that the decision below involves a direct conflict among the courts of appeals as to whether the "full and equal benefit" clause of 42 U.S.C. Section 1981(a) applies to private entities that are not acting under color of state law. This conflict concerns the uniform interpretation of the Nation's oldest civil rights statute, a recurring issue of unquestioned importance. The importance of this issue is underscored by the fact that an increasing number of claims are being made under the "full and equal benefit" clause and the courts have not yet provided concrete guidance on its meaning.

Chapman concedes in her Brief in Opposition ("Opp.") that "the scope of the post-amendment version of Section 1981 is an important issue of federal law." (Opp. 7.) However, Chapman argues that the Court should not address this "important issue of federal law" because: 1) the disagreement among five courts of appeals as to the scope of the "full and equal benefit" clause does not "present a true conflict" (Opp. 3); 2) this important issue of federal law is "not a 'recurring issue'" (Opp. 8); 3) the Court's decision below "does not misread the legislative history and does not lead to internal inconsistencies in the statute" (Opp. 8); and 4) the Court's ruling on Chapman's claim under a different statute somehow prevents review here (Opp. 9). None of these arguments is persuasive, and none changes the central fact that the Third, Fourth, and Eighth Circuits have held that the "full and equal benefit" clause does not apply to private actors, and the Second and Sixth Circuits have held that it does. It is this fact that warrants the Court's attention.

A. The Division Among the Courts Of Appeals As To Whether Claims Under The "Full and Equal Benefit" Clause Of Section 1981 Requires State Action Represents A True Conflict.

Chapman devotes most of her brief (Opp. 3-7) to arguing that the division among the courts of appeals over the scope of the "full and equal benefit" clause of Section 1981 does not "present a true conflict among the courts of appeals." Chapman's argument was rebutted by the Second Circuit in *Phillip v. University of Rochester*, 316 F.3d 291, 296 (2d Cir. 2003), where the court noted the growing conflict over the interpretation of the "full and equal benefit" clause among the courts of appeals, stating "we respectfully differ with the contrary conclusion reached by the Eighth and Third Circuits." The Sixth Circuit also recognized, in the en banc decision below, that "[t]wo sister Circuits, in *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3d Cir. 2001), and *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), disagree with us. . . ." 319 F.3d at 833, n.6. Pet. App. 13, n.6.

Chapman's disagreement with the Second Circuit and the Sixth Circuit concerning the existence of a conflict among the courts of appeals is based not on any reconciliation of conflicting opinions, but on Chapman's belief that cases disagreeing with her interpretation of the "full and equal benefit" clause are wrongly decided (Opp. 3-7).

Regardless of Chapman's view, the conflict among the courts of appeals over the interpretation of the "full and equal benefit" clause can only be resolved by this Court, and not by her gloss on the opinions analyzing that clause with which she disagrees.

Chapman argues that the Third Circuit in *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977) and *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3rd Cir. 2001), the Fourth Circuit in *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *rev'd in part on other grounds*, 481 U.S. 615 (1987), and the Eighth Circuit in *Youngblood v. Hy-Vee Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), and *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001) were wrong in concluding that the "full and equal benefit" clause of Section 1981 does not apply to private actors because these cases were decided before the 1991 amendment to Section 1981 or cite cases decided before the amendment.[1]

Once again, Chapman's argument does *not* show that there is no conflict among the courts of appeals or that any of these courts no longer require state action for a claim under the "full and equal benefit" clause. Indeed, the Third Circuit reiterated its view that state action was required in 2001 and the Eighth Circuit adopted that view the same year.[2] Instead, Chapman's argument merely illustrates why she disagrees with these decisions.

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[1] Chapman's *entire* argument against the decisions of the Third, Fourth, and Eighth Circuits is that they predate or do not sufficiently consider the effect of the 1991 amendment to Section 1981. But Chapman's argument goes too far. Neither the case law preceding that amendment nor the earlier legislative history of Section 1981 support her interpretation of the "full and equal benefit" clause. It is unlikely that Congress intended to transform this legal landscape by amending Section 1981 in 1991, particularly when the legislative history for that amendment is devoid of any mention of the "full and equal benefit" clause.

[2] In *Adams*, the Eighth Circuit declared: "[W]e recognize that this Court had not, until just recently, squarely adopted *Mahone*'s holding –

(Continued on following page)

Chapman's argument that the court of appeals decisions with which she disagrees failed to consider the effect of the 1991 amendment of Section 1981 is also incorrect. In both *Adams* and *Youngblood*, the Eighth Circuit cited the panel decision in *Chapman* in concluding that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Adams*, 271 F.3d at 777; *Youngblood*, 266 F.3d at 855. It is true, as Chapman points out, that the panel decision below was vacated and has no precedential effect in the Sixth Circuit. But it is also true, as the Second Circuit observed in *Phillip*, that "*Chapman* contains a lengthy analysis of the state action issue." 316 F.3d at 296. Indeed, the Second Circuit discussed the panel decision in *Chapman* at length "because the *Chapman* majority arguments coincide with defendants' arguments and were adopted by reference in *Youngblood*" 316 F.3d at 296.

Chapman also attempts to minimize the conflict among the courts of appeals over the "full and equal benefit" clause by claiming that there has been "an extremely limited number of Circuit decisions so far" (Opp. 7). In fact, this issue has been addressed by five of the twelve territorial courts of appeals, and has been the subject of an en banc decision in the Sixth Circuit and two opinions in the Eighth Circuit. This Court recently granted a petition for a writ of certiorari to resolve a conflict involving four courts of appeals. *Jones v. R.R. Donnelly & Sons Co.*, U.S. No. 02-1205, *cert. granted*, May

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although we had on several occasions cited *Mahone* with approval. . . . However, this Court has now directly addressed the issue." 271 F.3d at 777 (Citations Omitted).

19, 2003.[3] Thus, it is clear that, contrary to Chapman's arguments, there is a real and substantial conflict among the courts of appeals over the "full and equal benefit" clause.

B. The Proper Scope Of The "Full And Equal Benefit" Clause Of Section 1981 Presents An Important And Recurring Issue Of Federal Law.

Chapman also contends that, even though "the scope of the post-amendment version of Section 1981 is an important issue of federal law," it is not a "recurring issue of federal law" and thus does not merit review by the Court (Opp. 7-8). Chapman bases this argument on the fact that only five courts of appeals have considered the issue (Opp. 7-8).

Dillard's does not agree that an issue is not a "recurring issue of federal law" because it has been addressed by five of the territorial courts of appeals. As noted above, the Court has just recently granted certiorari to resolve a conflict involving four of the courts of appeals. Moreover, the Second, Third, Sixth, and Eighth Circuits have *all* addressed this issue in the last two years. And an increasing number of claims covering such disparate areas as the marketing of cigarettes, the supervision of children at

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[3] *Jones* involves the question of the proper statute of limitations for new causes of action created by the 1991 amendment to Section 1981. *Jones* demonstrates a continuing interest of the Court in interpreting issues raised by the 1991 amendment to Section 1981. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 1 (2003) (Court addresses impact of 1991 Civil Rights Act on mixed motive discrimination cases).

camp, the questioning of students at a university, and prison altercations are being brought under the "full and equal benefit" clause. (Pet. 18-19). The proper interpretation of the "full and equal benefit" clause of Section 1981 is an issue of recurring and growing importance.

C. Interpreting The "Full And Equal Benefit" Clause Of Section 1981 As Applying To Private Action Misreads The Legislative History And Leads To Inconsistencies In The Statute.

As Dillard's explained in detail in its petition for certiorari, applying the "full and equal benefit" clause to private action both misreads the legislative history and leads to internal inconsistencies in the statute. (Pet. 20-26). Chapman attempts to counter this by citing to a statement from a House Report on the 1991 amendment of Section 1981 that makes *no* mention of the "full and equal benefit" clause (Opp. 8). The statement quoted by Chapman indicates that subsection (c) was added to Section 1981 "to strengthen *existing* protections and remedies available under federal civil rights laws and to provide more effective deterrence and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40 (II) at 1, *reprinted in* 1991 U.S.C.C.A.N. at 964. (Emphasis added).

This statement does not support Chapman's argument. Claims against private actors under the "full and equal benefit" clause were not part of the "existing protections and remedies available under federal civil rights law" in 1991. Prior to the 1991 amendment, all courts of appeals to have considered the issue, and almost all district courts to have considered the issue, had concluded

that the "full and equal benefit" clause did not apply to private actors.[4]

D. The Sixth Circuit's Decision On Chapman's Section 1983 Claim Has No Bearing On This Matter.

Chapman's final argument opposing Dillard's petition is Chapman's claim that because the Sixth Circuit found that there was a question of material fact as to whether Dillard's acted under color of state law, the District Court's grant of summary judgment to Dillard's would still have been in error even if "the Sixth Circuit had found . . . that state action is required for a claim under Section 1981's 'full and equal benefit' clause" (Opp. 9). What Chapman neglects to mention is that the Sixth Circuit found that there was a genuine issue of material fact as to whether Dillard's acted under "color of state law" with respect to Chapman's putative claim under 42 U.S.C. Section 1983 and *not* with respect to her Section 1981 claim. 319 F.3d at 834, 843. Pet. App. 17-18, 34.

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[4] Indeed, most court decisions and legal writings analyzing Section 1981 have focused on the "make and enforce contracts" clause of the statute and on the outer limits of that provision. Chapman's position is that the amendment of Section 1981 in 1991, which expressly addressed the "make and enforce contracts" clause, in effect rendered it redundant because similar relief is now available under the "full and equal benefit" clause without any need for a contractual showing. Yet, the legislative history contains no mention of the "full and equal benefit" clause and, as Chapman notes, Congress was interested in strengthening "existing protections and remedies."

The majority in *Chapman never* considered whether Dillard's was engaged in state action for purposes of the "full and equal benefit" clause of Section 1981, and Judge Suhrhunrich's dissenting opinion, while agreeing with the majority's analysis of Chapman's putative Section 1983 claims, expressly noted that "I would hold that Chapman failed to state a cognizable § 1981 claim because the alleged private discrimination she suffered is *not within the purview* of the equal benefit clause" 319 F.3d 843. Pet. App. 34 (Emphasis added). Thus, both the majority (which never discussed the state action issue with respect to Chapman's Section 1981 claim) and the dissent (which indicated that the discrimination alleged by Chapman was outside the scope of the "full and equal benefit" clause) regarded the question of whether the "full and equal benefit" clause applied to private action as outcome determinative with respect to Chapman's Section 1981 claim. The Court should grant this petition to answer the question of whether the "full and equal benefit" clause requires state action and to create a uniform standard as to the meaning of that clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN B. LEWIS
Counsel of Record
THOMAS J. PIATAK
GREGORY V. MERSOL
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200

Counsel for Petitioner

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN B. LEWIS
Counsel of Record
THOMAS J. PIATAK
GREGORY V. MERSOL
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

On October 6, 2003, the Court invited the Solicitor General to express the views of the United States on the Higbee Company d/b/a Dillard Department Stores, Inc. ("Dillard's") Petition for a Writ of Certiorari. The Solicitor finally filed a brief on May 28, 2004. The vast majority of the Solicitor's brief is given over to arguing that the decision below was correct. It largely ignores the question of whether the proper scope of the "full and equal benefit" clause of 42 U.S.C. § 1981(a) is an important one and omits entirely any mention of the second question Dillard's presented in its petition for a writ of certiorari – " . . . the proper scope of the 'full and equal benefit' clause of 42 U.S.C. § 1981(a)."

While ignoring the question of whether the proper scope of the "full and equal benefit" clause warrants review by the Court, the Government concedes in its Amicus Curiae Brief ("Amicus") that "the courts of appeals have issued conflicting decisions" on the need for state action under that clause. (Amicus 7). However, the Government asserts that the Court should not resolve this conflict among the courts of appeals because it argues: (1) the decision below is correct (Amicus 8); (2) the conflict among five courts of appeals as to the scope of the "full and equal benefit clause" "is not sufficiently developed to warrant the Court's review" (Amicus 16); and (3) the Court's ruling on Chapman's claim under a different statute somehow prevents review here. (Amicus 19).

None of those arguments is persuasive, and none changes the central fact that the Third, Fourth, and Eighth Circuits have held that the "full and equal benefit

clause" does not apply to private actors, and the Second and Sixth Circuits have held that it does, without providing any practical guidance as to how "full and equal benefit clause" applies to private actors. Even if the Government were correct that the "full and equal benefit" clause applies to private actors, the lack of any guidance as to the how that clause applies to those actors would still deserve the Court's attention.

A. The Decision Below Is Incorrect And Misreads The Statute And Its Legislative History

The Government devotes most of its brief (Amicus 8 – 15) to arguing how the decision below might be correct. The Government's argument does not show that there is no conflict among the courts of appeals or that all of these courts no longer require state action for a claim under the "full and equal benefit" clause. The Government's belief that the decision below was correct does not and cannot resolve the conflict among the courts of appeals. Only this Court can do that.

The Government argues, as did Chapman, that the plain language of Section 1981(c) required the result below. But Section 1981(c) is ambiguous; it does not define which "rights" it covers, nor does it indicate whether it refers back to subsection (a) or subsection (b) of the amended Section 1981. And the literal language of Section 1981(a) appears to include as a "right" only the "right . . . to make and enforce contracts," "to sue," "be parties," and "give evidence." Indeed, the Court has *not* included the "full and equal benefit" clause in its enumeration of the rights protected by Section 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 (1989). *See also, Runyon*

v. McCrary, 427 U.S. 160, 195 n. 5 (1976) (White, J., dissenting). Thus, it is far from clear that the "full and equal benefit clause" is one of the "rights" protected by Section 1981(a), much less one of the "rights" covered by Section 1981(c).

The Government argues that construing the "full and equal benefit" clause to apply to private actors poses no problems, citing the construction afforded 42 U.S.C. Section 1985(3) in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). (Amicus 10-11). More recently, however, the Court has recognized "the constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). There is no need to even approach those shoals here, because the literal language of Section 1985(3), unlike the "full and equal benefit" clause, expressly contemplates private action. Finally, other courts have observed that the perplexing structure of Section 1985(3) limits its usefulness as a model in construing other statutes. *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988) (noting that "[t]his statute addresses private acts – going 'in disguise on the highway' is a reference to the M.O. of the Ku Klux Klan – yet condemns only deeds that 'deprive' the victim of the 'equal protection of the laws, or of equal privileges and immunities under the law,' something within the domain of government exclusively. This admixture of private and public action has befuddled courts ever since.").

The Government attempts to get around the fact that Section 1981(a) also provides that all persons "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other" by arguing that "[i]t requires no strain of the imagination to

identify private entities, such as schools, that impose 'punishment' on individuals." (Amicus 11). Not only does this argument illustrate the potentially unlimited applicability of the "full and equal benefit" clause if it is held to apply to private actors, it still does not resolve the interpretive difficulties that would follow from holding that Section 1981(c) applies to private actors. Not even the Government suggests that private entities impose "taxes," and if portions of Section 1981(a) do refer entirely to state action, it is simply not possible to read Section 1981(c) as the Solicitor insists it must be read – as protecting *all* rights mentioned in Section 1981(a) against private as well as public discrimination.

In an attempt to explain why the "full and equal benefit" clause applies to private actors, the Government notes that the clause refers to the "full and equal benefit of all laws and proceedings for the security of persons and property," and suggests that "private entities can establish 'proceedings' to protect the safety and security of individuals." (Amicus 11, n. 2). If instituting a work rule prohibiting strip searches is, as the Government suggests, sufficient to bring a private entity within the ambit of the "full and equal benefit" clause, the potential for new litigation under that clause is truly unlimited.

The Government also attempts to minimize the legislative history, which shows that Section 1981(c) was intended to codify *Runyon v. McCrary*, 427 U.S. 160 (1976), not to overturn the many decisions requiring state action for claims under the "full and equal benefit" clause.

(Amicus 12-13).[1] While claiming that this legislative history is "ambiguous" (Amicus 13), the Government ignores cases holding that Section 1981(c) was intended *solely* to codify *Runyon* and to prohibit discrimination in private, as well as public, contracting. *See, e.g., Dennis v. County of Fairfax*, 55 F.3d 151, 156, n. 1 (4th Cir. 1995) ("[S]ubsection (c) did not purport to overrule [the holding in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989)] with respect to municipal liability but only to codify *Runyon v. McCrary*"). The Government also ignores the title of the Civil Rights Act of 1991: "Restoring Prohibition Against All Racial Discrimination *in the Making and Enforcement of Contracts*." H. R. Rep. No. 102-40(II), at 35 (emphasis added). Also absent from the Solicitor's brief is any recognition that, prior to the enactment of Section 1981(c), every court of appeals and the majority of all federal courts to have considered the issue had held that the "full and equal benefit clause" requires state action.

Finally, the Government dismisses Dillard's concerns about interpreting the "full and equal benefit" clause in such a way as to federalize tort law as a "policy argument."

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[1] Nor does the legislative history of the Civil Rights Act of 1866, which first codified what became the "full and equal benefit" clause of Section 1981(a), support the Government's arguments. That Act was not intended to be a broad prohibition against racial discrimination by private actors, but was focused on state discrimination against the newly freed slaves. In 1866 "Congress intended to protect a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966). In fact, the portions of the bill that contained a general prohibition against discrimination were deleted in the House to secure passage. *Id. See Cong. Globe*, 39th Cong., 1st Sess., 1366 (1866). *See also* Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 11-29 (1955).

(Amicus 13). It is more than that; a desire to avoid federalizing tort law is more in the nature of a rule of construction, grounded in a concern for the federalism that lies at the heart of the Constitution. For that reason, the Court has repeatedly cautioned against interpreting Section 1981 and other early civil rights statutes to create a general federal tort law. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989); *Bray v. Alexandria Woman's Health Clinic*, 506 U.S. 263, 268 (1993). As Justice Kennedy observed in his concurring opinion in *Bray*, "as all recognize, essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step in interpreting § 1985(3) risks making a whole category of ordinary state crimes a concurrent violation of a single Congressional statute passed more than a century ago." 506 U.S. at 287.

The Government argues that the dismissal of many claims under the "full and equal benefit" clause shows that Dillard's concerns about federalizing tort law are overblown. (Amicus 14-15, citing Pet. 19). But these cases were dismissed precisely *because* they were being brought against private actors, the very limitation the Government wishes to eliminate. The Government argues that Section 1981's requirement of "intentional discrimination on the basis of race" (Amicus 14) will severely limit the number of cases that will be brought under the "full and equal benefit" clause, ignoring the fact that thousands of suits making just such allegations are filed each year in the employment context. The Government also ignores the fact that the courts have yet to develop *any* guidance, much less limits, concerning claims that may be brought against private actors under the "full and equal benefit" clause. The Second Circuit, while agreeing with the Government

that the "full and equal benefit" clause applies to private actors, did not "attempt to define the universe of laws and proceedings for the security of persons and property, believing this task best resolved case by case." *Phillip v. University of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003).

B. The Division Among The Courts Of Appeals As To Whether Claims Under The "Full And Equal Benefit" Clause Of Section 1981 Require State Action Represents A True Conflict

The Government argues that conflict among the courts of appeals over whether the "full and equal benefit" clause applies to private entities is "shallow" (Amicus 1), but the very length of the Government's description of the conflict (Amicus 16-18) belies any claim that it is "shallow."

The Government argues that the Eighth Circuit failed to consider the impact of the enactment of subsection (c) to Section 1981. However, in both *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001), and *Youngblood v. Hy-Vee Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), the Eighth Circuit cited the panel decision in *Chapman v. The Higbee Co.*, 256 F.3d 416 (6th Cir.), *vacated*, 270 F.3d 297 (6th Cir. 2001), in concluding that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Adams*, 271 F.3d at 777; *Youngblood*, 266 F.3d at 855. The Second Circuit, while declining to follow the panel decision in *Chapman*, recognized that "*Chapman* contains a lengthy analysis of the state action issue" and discussed the panel decision at length "because the *Chapman* majority arguments coincide with the defendants' arguments and were adopted by reference in *Youngblood*." 316 F.3d at 296.

The Government's attempts to dismiss the Third Circuit's holdings in *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), and *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (2001), as "dicta" are similarly unavailing. *Brown* merely underscores the continuing vitality of *Mahone*, which not only contains a lengthy analysis of why the "full and equal benefit" clause requires state action but has been cited by virtually every case to consider this issue, even by the courts disagreeing with *Mahone's* analysis.

C. The Sixth Circuit's Decision On Chapman's Section 1983 Claim Has No Bearing On This Matter

The Government's final argument is that, because the Sixth Circuit found that there was a genuine issue of material fact as to whether Dillard's acted under color of state law, Dillard's appeal is somehow "interlocutory." (Amicus 19). What the Government neglects to mention is that the Sixth Circuit found that there was a genuine issue of material fact with respect to Chapman's putative claim under 42 U.S.C. Section 1983 and *not* with respect to her Section 1981 claim. 319 F.3d at 834, 843. Pet. App. 17-18, 34.

The majority in *Chapman never* considered whether Dillard's was engaged in state action for purposes of the "full and equal benefit" clause of Section 1981, and Judge Suhrheinrich's dissenting opinion, while agreeing with the majority's analysis of Chapman's putative Section 1983 claims, expressly noted that "I would hold that Chapman failed to state a cognizable § 1981 claim because the alleged private discrimination she suffered is *not within the purview* of the equal benefit clause" 319 F.3d 843. Pet. App. 34 (Emphasis added). Thus, both the majority (which

never discussed the state action issue with respect to Chapman's Section 1981 claim) and the dissent (which indicated that the discrimination alleged by Chapman was outside the scope of the "full and equal benefit" clause) regarded the question of whether the "full and equal benefit" clause applied to private action as outcome determinative with respect to Chapman's Section 1981 claim. The Court should grant this petition to answer the question of whether the "full and equal benefit" clause requires state action and also to create a uniform standard as to the meaning of that clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN B. LEWIS
Counsel of Record
THOMAS J. PIATAK
GREGORY V. MERSOL
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
(216) 621-0200

Counsel for Petitioner

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No. 02-1646

In the Supreme Court of the United States

THE HIGBEE COMPANY, PETITIONER

v.

LYNETTE CHAPMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

R. ALEXANDER ACOSTA
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

MARK L. GROSS
TERESA KWONG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the "full and equal benefit" clause of 42 U.S.C. 1981(a) applies to the conduct of private entities that are not acting under color of state law.

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In the Supreme Court of the United States

No. 02-1646

THE HIGBEE COMPANY, PETITIONER

v.

LYNETTE CHAPMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The question presented in this case is whether the "full and equal benefit" clause of 42 U.S.C. 1981(a) applies to private conduct. Congress directly answered that question in 42 U.S.C. 1981(c), which provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination." Because the statute is so explicit, certiorari review by this Court is not warranted at this time. The conflict in the circuits is shallow and, in light of Section 1981(c)'s plain text, may not endure. In addition, the interlocutory character of the petition creates a significant likelihood that further proceedings on remand could render the question presented irrelevant to the outcome of this case.

STATEMENT

1. Section 1981 of Title 42, United States Code, provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Subsection (a) of Section 1981 was passed as part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, a statute that was designed to "secure[] for all citizens the 'same' rights as were 'enjoyed by white citizens' in a variety of fundamental areas." *Georgia* v. *Rachel*, 384 U.S. 780, 788 (1966). The category of rights protected by Section 1981 is "specifically defined in terms of racial equality." *Id.* at 791; see also *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982) (same). In 1991, Congress amended Section 1981 by adding subsections (b) and (c) to clarify the scope of

the rights that the Act guarantees. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072.[1]

2. a. While shopping at one of petitioner's department stores, respondent Lynette Chapman, an African American, entered a fitting room from which a Caucasian woman had just exited. Chapman noticed on the floor a sensor that is designed to prevent the shoplifting of clothes. After Chapman left the fitting room, a salesperson saw the sensor on the floor and, suspecting Chapman of shoplifting, notified a store security officer. Pet. App. 3.

The security officer was an off-duty sheriff's deputy. The record indicates that the sheriff's department and the department store had a close relationship. While working at the store, the deputy wore his official sheriff's department uniform and badge and carried his department-issued sidearm. Pet. App. 3. The sheriff's department posted for its officers notices of job openings at petitioner's department store. Departmental approval was required before an officer could work for petitioner, and the sheriff's department retained the authority to terminate the employment. *Id.* at 59. The sheriff's department required its officers, when working for petitioner, to follow the department's rules and procedures. In addition, at the time of the events at issue here, there was an annual written indemnity and hold harmless

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[1] Congress added subsection (b) in response to this Court's holding in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), that Section 1981 did not reach private acts of racial discrimination that occur after the formation of an employment contract, such as "breach of the terms of the contract or imposition of discriminatory working conditions," *id.* at 177. Subsection (b) now makes clear that Section 1981(a) protects against impairment on the grounds of race of a person's "enjoyment of all benefits * * * and conditions of the contractual relationship." 42 U.S.C. 1981(b); see H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 2 (1991); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 301-307 (1994). See generally *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1839-1840 (2004).

agreement between petitioner and the sheriff's department. *Ibid.* The department store's "Rules and Procedures for Security Personnel" provided that, in cases of suspected shoplifting, "[s]trip searches are prohibited," and "[i]f you suspect that stolen objects are hidden on [the shopper's] person, call the police." *Id.* at 3.

The officer stopped Chapman, and he and a female manager searched Chapman's purse. Pet. App. 3. The officer then directed Chapman to accompany the manager into a fitting room, where the manager required Chapman to remove her coat and suit jacket and to lift up her shirt. No department merchandise was found on Chapman's person or in her purse. *Ibid.* Chapman identified to the security officer and the manager the Caucasian woman who had preceded her into the dressing room, but that woman was not questioned or detained. *Id.* at 37, 99.

b. Chapman filed suit against petitioner under 42 U.S.C. 1981(a), alleging that petitioner's employees violated her right to "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." She also alleged, pursuant to 42 U.S.C. 1983, that petitioner violated her right to be free from unreasonable searches and seizures under the Fourth Amendment and her due process rights under the Fifth Amendment. Pet. App. 3-4.

The district court, acting through a magistrate judge by the parties' consent, granted summary judgment for petitioner. Pet. App. 98-108; see also *id.* at 110-120. The court dismissed Chapman's claim under Section 1981 on the ground that the "full and equal benefit" clause extends only to state action. *Id.* at 102-104. The district court also dismissed Chapman's Section 1983 claim on the ground that the security officer was not acting under color of state law. *Id.* at 106-107.

3. A divided panel of the court of appeals affirmed. Pet. App. 35-95. The majority agreed with the district court that the "full and equal benefit" clause of Section 1981(a) protects only against deprivations caused by governmental actors. The majority reasoned that, "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Id.* at 41. The majority also affirmed dismissal of the Section 1983 claim on the ground that the officer was acting "pursuant to his duties as a private security guard." *Id.* at 59. Judge Suhrheinrich concurred, Pet. App. 60-76, expressing his view that Section 1981(c)'s language providing that the rights guaranteed by Section 1981 are protected against both private and governmental discrimination could not be applied to the "full and equal benefit clause" because that would not accord with that clause's "ordinary and common meaning." *Id.* at 61.

Judge Moore dissented. Pet. App. 76-95. She considered the language of subsection (c) to be "perfectly clear" that the "rights" protected by subsection (a) "are protected against impairment by nongovernmental discrimination." *Id.* at 77 (quoting 42 U.S.C. 1981(c)). She also considered "logically flawed" the majority's premise that only the State can deprive an individual of the benefits of laws or proceedings, because, "[a]lthough the state does make the law, one private actor may deprive another of the full and equal benefit of those laws just as readily as a state actor." *Id.* at 80. She offered as an example the situation where a state law guarantees equal access to public facilities, but "private persons design to deny racial minorities access to such places through intimidation." *Ibid.*

4. The court of appeals granted rehearing en banc and reversed the panel opinion. Pet. App. 1-34. The en banc court held that the language of Section 1981(c), which states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination,"

unambiguously protects all of the rights contained in Section 1981(a) against discrimination by private entities. *Id.* at 6. The en banc court found nothing anomalous about the notion that private individuals could deny persons the equal benefit of the laws, noting that, in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), this Court held that an "analogous equal protection provision" in 42 U.S.C. 1985(3) applied to private action. Pet. App. 8. The court found "equivocal" the legislative history of Section 1981(c), which discussed the application of that section to private contracts, but was silent regarding its application to the other rights protected by subsection (a). *Id.* at 11. The court explained that Congress's "failure to comment upon statutory language simply does not constitute a rejection of the plain import of that language." *Id.* at 10.

The en banc court stressed that applying the plain meaning of Section 1981(c) would not federalize all state tort claims because "the language surrounding the 'full and equal benefit' clause serves to cabin both the number and nature of claims that may be brought." Pet. App. 12. In particular, the court noted that a cause of action arises under the statute only when a party denies another "the benefit of a law or proceeding protecting his or her personal security or a cognizable property right." *Ibid.* In addition, in order to prevail, plaintiffs would need to "prove intentional discrimination on the basis of race, which involves a high threshold of proof." *Ibid.*

Finally, the en banc court reversed the district court's dismissal of respondent's Section 1983 claim and remanded it for further proceedings. Pet. App. 13-18. The court found that there was a genuine issue of material fact regarding whether the security officer acted under color of state law when he asked Chapman to enter the fitting room with the sales manager for a strip search. The court noted that, because "Dillard's policy *mandates* police intervention in strip search situations, a reasonable jury could very well find that

the initiation of a strip search by an armed, uniformed sheriff's deputy constituted an act that may fairly be attributed to the state." *Id.* at 17.

Judge Suhrheinrich, joined by Judges Boggs and Batchelder, dissented. Pet. App. 2, 18-34. Relying on the Third Circuit's opinion in *Mahone* v. *Waddle*, 564 F.2d 1018 (1977), cert. denied, 438 U.S. 904 (1978), he would have held that "[a]n act by a private individual which violates the legal rights of another is not the equivalent of a deprivation of the full and equal benefit of the law violated." Pet. App. 24. He also contended that the majority's decision would have the absurd result of federalizing state tort law. *Id.* at 33.

DISCUSSION

Petitioner is correct (Pet. 12-26) that the courts of appeals have issued conflicting decisions on the question whether the conduct of private actors falls within the scope of Section 1981's clause protecting all persons against racial discrimination in the enjoyment of the "full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. 1981(a). The en banc Sixth Circuit here (Pet. App. 5-13) and the Second Circuit, in *Phillip* v. *University of Rochester*, 316 F.3d 291, 294-298 (2003), have squarely held that the "full and equal benefit" guarantee of Section 1981(a) protects against racial discrimination by private actors. The Eighth Circuit has held the opposite, concluding that the "full and equal benefit clause" applies exclusively to the conduct of governmental actors. *Adams* v. *Boy Scouts of America*, 271 F.3d 769, 777 (8th Cir. 2001).

Not every circuit conflict, however, merits this Court's immediate intervention and, in the view of the United States, the Court's review of the scope of the "full and equal benefit" clause of Section 1981 at this time is not warranted. Congress has already directly answered the question presented in the text of Section 1981. Section 1981(c)

provides, in straightforward terms, that all of the "rights protected by this section are protected against impairment by nongovernmental discrimination." The Sixth Circuit's decision here, as well as the Second Circuit's decision in *Phillip*, properly gave effect to that statutory directive. While the Eighth Circuit has held to the contrary, that court's abbreviated analysis simply hewed to precedent that predates Congress's enactment of subsection (c), without mentioning, let alone analyzing, the import of that amendment. Because the circuit conflict is shallow, there is no pressing need for this Court to resolve the question before the Eighth Circuit has had the opportunity to reconsider its position in light of subsection (c) and the intervening analyses of the Second and Sixth Circuits that rely on the plain import of that subsection. Finally, the interlocutory posture in which petitioner seeks this Court's review means that further proceedings on remand could render the question presented entirely academic.

1. The Decision Below Is Correct And Compelled By The Clear Terms Of Section 1981(c)

Determining the scope of Section 1981's protection "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, that is also where the inquiry should end. As the court of appeals recognized (Pet. App. 6), Section 1981(c) squarely provides that "the rights"—all of them—protected by this section [1981]" are protected against both governmental and "nongovernmental discrimination." 42 U.S.C. 1981(c). Congress thus already has answered the question presented in clear and straightforward language. There is no need for judicial construction to proceed further because "[t]here can be no construction when there is nothing to construe." *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867); see also *Bedroc*

Ltd., LLC v. *United States*, 124 S. Ct. 1587, 1593 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

The statutory structure reinforces the text's meaning. While petitioner posits (Pet. 22-23) that Congress intended only to codify Section 1981's application to private contracts, Congress's enactment of a separate and distinct subsection (c), with no limiting or qualifying language, points to the opposite conclusion. If Congress intended to refer only to private contracts, it likely would have employed the same limiting language it used in the simultaneously enacted subsection (b), which, by its terms, pertains exclusively to Section 1981's "make and enforce contracts" clause. Instead, at the same time it limited subsection (b) to the "make and enforce contracts" clause of Section 1981(a), Congress wrote subsection (c) in terms that apply to all of the "rights" protected by Section 1981(a). In other words, when Congress wanted to restrict one of the 1991 amendments to Section 1981's contract clause, it said so explicitly. The absence of such limiting language in the simultaneously enacted subsection (c) thus speaks volumes. See *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Petitioner and the dissenting judge in the Sixth Circuit offer three reasons why they believe the Sixth and Second Circuits' adherence to Section 1981(c)'s plain text is wrong. None of them withstands scrutiny.

First, petitioner (Pet. 22, 24) and the dissent (Pet. App. 21-22) argue that hewing to Section 1981(c)'s language would create "textual inconsistencies" (Pet. 22) because only state actors can deprive persons of the equal benefit of laws and proceedings. As an initial matter, that arguments rests on

the flawed premise that, because only state actors can be the source of laws, only state actors can deprive individuals of the equal benefits of those laws. But, while private actors may not be the source of laws, they still can deprive others of the equal benefit of those laws by, among other things, intimidation and violence. This Court made exactly that point in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). *Griffin* held that a companion civil rights provision protected against both governmental and private actions that "depriv[e]" persons "of the equal protection of the laws, or of equal privileges and immunities under the laws," 42 U.S.C. 1985(3). In words that speak directly to petitioner's argument, this Court explained:

> A century of Fourteenth Amendment adjudication has * * * made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.

403 U.S. at 97.

Indeed, the Court reasoned that Congress's "failure to mention" in the statutory text that private conduct was excluded was "an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." *Griffin*, 403 U.S. at 97. The Court also noted that Section 1985(3)'s reference to persons who "go in disguise" was "so commonly connected with private marauders" that the language must cover private conduct. *Id.* at 96. The Court then concluded that the other closely related clauses of Section 1985(3) could not be "read to require the involvement of state officers." *Ibid.* Here, the

language of Section 1981(c) is even more explicit about reaching private conduct.[2]

The dissenting judge attempted (Pet. App. 26-30) to distinguish *Griffin* by noting that Section 1985(3) expressly refers to the actions of "two or more persons" that deprive individuals of their equal rights under the law. *Id.* at 26. That is true, but it is a distinction that hurts rather than helps petitioner. If the somewhat ambiguous reference to "persons" who "go in disguise" is sufficient to establish that private actors can deny individuals the equal protection of the law, then Section 1981(c)'s provision, in terms, that "non-governmental" actors are covered must perforce be sufficient to the task.

Petitioner's other perceived "interpretive difficult[y] (Pet. 24)—that Section 1981(a)'s "like punishment" clause can only refer to state actors—fares no better. It requires no strain of the imagination to identify private entities, such as private schools, that impose "punishment" on individuals. That is particularly true in light of the evidence or private violence and intimidation before Congress at the time of Section 1981's enactment. See page 15, *infra*. In any event, even if petitioner is correct that the substantive scope of the "like punishment" or the "full and equal benefit" clauses, in practice, will rarely apply to the conduct of private actors, that would be a result, not of judicial inference of the very state-action element that Congress expressly foreclosed in

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[2] Petitioner's and the dissent's arguments, moreover, seize upon the "full and equal benefit" clause's reference to "laws" that provide "for the security of persons and property," which, they point out, only governments can enact. But Section 1981 refers both to "laws *and proceedings* for the security of persons and property" (emphasis added). It may be that private entities can establish "proceedings" to protect the safety and security of individuals. Cf. Pet. App. 3 (describing petitioner's "Procedures for Security Personnel" that, among other things, restrict the strip searches of customers).

subsection (c), but of judicial construction of what types of "punishments" Section 1981 encompasses and what it means to deny a person the "equal benefit" of laws or proceedings. While courts might ultimately adopt readings of those terms that most commonly embrace the conduct of governmental actors, that would not and, in light of subsection (c), could not mean that those clauses impose a state-action element or requirement in all cases as a matter of law. Whatever the ultimate reach of the "full and equal benefit" language, it seems clear that some private conduct, such as intimidation designed to deny an individual the equal benefits of facially neutral laws, is prohibited by Section 1981(a).

Second, petitioner (Pet. 22-23) and the dissent (Pet. App. 30-32) contend that the legislative history precludes adherence to Section 1981(c)'s text. Petitioner explains (Pet. 22) that a report from one House Committee stated that Section 1981(c) was intended to codify this Court's decision in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which held that Section 1981 prohibits acts of private racial discrimination in contracting. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 37 (1991). A report from another House Committee stated that Section 1981(c) "confirms Section 1981's coverage of both public and private sector employment." *Id.* Pt. 1, at 92.

That is a true rendition of the legislative history, but it does nothing to advance petitioner's cause. As an initial matter, it is unclear why petitioner considers assurances that Section 1981(c) means exactly what it says in the specific context of contracting as somehow evidencing Congress's intent to exclude other forms of private conduct. And the overall thrust of the 1991 amendments was to extend, not to limit, civil rights remedies. See H.R. Rep. No. 40, *supra*, Pt. 2, at 1 (an overall purpose of the 1991 amendments was "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective

deterrence and adequate compensation for victims of discrimination").

In any event, while a court may "refer to a statute's legislative history to resolve statutory ambiguity," *Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991), the Court has never held that ambiguous or silent legislative history provides a basis for disregarding clear and duly enacted statutory text.[3] Nor does petitioner's suggestion that Congress might not have foreseen a particular application of statutory text license the Court to judicially contract the law's operation. *United States* v. *Lorenzetti*, 467 U.S. 167, 179 (1984) ("[T]he fact that changing state tort laws may have led to unforeseen consequences does not mean that the federal statutory scheme may be judicially expanded to take those changes into account.").

Third, petitioner (Pet. 16-20) and the dissent (Pet. App. 32-34) express concern that enforcing Section 1981(a) and (c) according to their plain terms will result in federalizing tort law. The short answer is that such policy arguments are directed to the wrong forum. Plain statutory text that has been enacted by both Houses of Congress and signed by the President cannot be modified by this Court just because a party considers the law to be bad policy. "If an amendment to the statute is needed to deal with a problem that Congress did not foresee, it is Congress—not this Court—that must perform that task." *Ralston* v. *Robinson*, 454 U.S. 201, 233 (1981) (Stevens, J., dissenting); see also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 183 (1989) (while the Court

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[3] See *Bedroc Ltd.*, 124 S. Ct. at 1595 n.8 (declining "invitation to presume that Congress expressed itself in a single House Committee Report rather than in the unambiguous statutory text approved by both Houses and signed by the President"); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

is generally "'reluctant to federalize' matters traditionally covered by state common law," that reluctance "must" give way "when Congress plainly directs" such a result).[4]

In addition, this Court already rejected that concern in *Griffin*, when it explained that whatever "constitutional shoals * * * would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation"—intentional discrimination on the basis of race—that Section 1981(a)'s text already requires. 403 U.S. at 102; see *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993); see also *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 389 (1982) ("[Section] 1981 reaches only purposeful discrimination" on the basis of race.). That is an "exceedingly high standard" of proof, *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1998), which ensures that Section 1981 will not provide relief for routine "barroom brawl[s]" (Pet. App. 33). Section 1981's scope is further limited by the requirement that a plaintiff prove that he or she was deprived of the "full and equal benefit" of a "law or proceeding" and that the defendant "inten[ded] to deprive persons of a right guaranteed against private impairment." *Bray*, 506 U.S. at 274; see *id.* at 276 & n.6; see also *United Bhd. of Carpenters & Joiners of America* v. *Scott*, 463 U.S. 825, 833 (1983). As petitioner acknowledges (Pet. 19), those limitations already have re-

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[4] Petitioner does not argue that Congress lacks the legislative authority to apply the "full and equal benefit" clause to private conduct. Section 1981 was enacted pursuant to Congress's power under both the Thirteenth and Fourteenth Amendments, and the former specifically empowers Congress to regulate private conduct. *General Bldg. Contractors*, 458 U.S. at 389; *Runyon*, 427 U.S. at 179.

sulted in the dismissal of numerous claims brought under the "full and equal benefit" clause.

On the other hand, petitioner offers no sound reason why the same Congress that sought to protect newly freed slaves against refusals to contract and denials of housing based on race would have withheld a federal remedy for the brutal assaults and murders of African Americans, solely because of their race, that were occurring at the time of Section 1981's enactment. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427-428 (1968) (legislative history of Section 1981 included numerous "references to private injustices against Negroes," including "white citizens who assaulted Negroes") (footnote omitted); *Hawk* v. *Perillo*, 642 F. Supp. 380, 386-387 (N.D. Ill. 1986) ("full and equal benefit" clause provided basis for claim arising from a severe, racially motivated beating) (cited at Pet. App. 12 n.5). In that respect, when applied according to its terms, Section 1981(a)'s "full and equal benefit" clause complements 42 U.S.C. 1985(3)'s protection against conspiracies to deprive individuals of the equal protection of the law. When applied according to petitioner's terms, by contrast, Section 1981's "full and equal benefit" clause is redundant of the protection against actions taken under color of state law already afforded by 42 U.S.C. 1983. See *Griffin*, 403 U.S. at 99 (declining to restrict 42 U.S.C. 1985(3) to action taken under color of law because, in light of Section 1983, that reading would deprive Section 1985(3) "of all independent effect"). In short, there is no sound basis for concluding, as petitioner's and the dissent's analysis assumes, that the "broad language" of Section 1981 "was a mere slip of the legislative pen." *Jones*, 392 U.S. at 427.

2. The Circuit Conflict Is Not Sufficiently Developed To Warrant This Court's Review, Especially In Light Of Section 1981(c)'s Clarity

The circuit conflict is not sufficiently broad or well-developed to warrant review at this juncture. Only the Eighth Circuit has held that the "full and equal benefit" clause requires state action as an element of the claim. See *Adams*, *supra*; *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (2001), cert. denied, 535 U.S. 1017 (2002). In light of subsection (c)'s plain text, that conflict may not endure. Although the *Adams* and *Youngblood* decisions both postdate the 1991 addition of subsection (c) to Section 1981, the Eighth Circuit's abbreviated consideration of the issue in those cases does not even acknowledge the existence of subsection (c), let alone grapple with its implications. *Youngblood*'s two-sentence consideration of the scope of the "full and equal benefit" clause simply cites the since-overturned panel decision in the present case and dicta from a Third Circuit case that predates the 1991 amendment. See 266 F.3d at 855 (citing *Mahone* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978)). The Eighth Circuit's follow-on decision in *Adams*, in turn, simply quotes and applies *Youngblood*. 271 F.3d at 777.[5] Given the directness with which Congress has spoken in subsection (c), if the Eighth Circuit considers the scope of the "full and equal benefit" clause in light of the 1991 amendment and the well-reasoned decisions of the en banc Sixth Circuit and the Second Circuit in *Phillip*, *supra*, the Eighth Circuit may well

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[5] While the dissent in *Youngblood* includes a block quote of the complete text of Section 1981, including subsection (c), 266 F.3d at 856 (Richard Arnold, J., dissenting), subsection (c) is never mentioned in either the majority's or the dissent's analyses. A Westlaw search has identified no other Eighth Circuit case that even cites, let alone discusses, Section 1981(c).

conform its law to that of the other circuits. The directness of the statutory text likewise makes it unlikely, in the interim, that any other circuit will follow the Eighth Circuit's lead.

Contrary to petitioner's contention (Pet. 13-14), the Third Circuit has not definitively sided with the Eighth Circuit's holding that the "full and equal benefit" clause captures only governmental discrimination on the basis of race. While that court said, in *Brown* v. *Philip Morris Inc.*, 250 F.3d 789 (2001), that "only state actors can be sued under the 'full and equal benefit' clause of § 1981," *id.* at 799, that statement was not necessary to the court's decision. The court prefaced its comment about the scope of Section 1981 with the holding that the plaintiffs had waived their claim under the "full and equal benefit" clause because it "do[es] not appear to have been raised in the District Court and no exceptional circumstances suggest review of such claims notwithstanding Black Smokers' failure to argue them previously." *Ibid.* The statement that governmental conduct is a component of a "full and equal benefit" clause claim accordingly was an aside, introduced with the qualification "even if we were to consider [it]." *Ibid.* Furthermore, the Third Circuit followed its dicta about the "full and equal benefit" clause with the holding that the plaintiffs' claims "are not * * * cognizable under §[] 1981" because they "remain fundamentally allegations of discriminatory advertising." *Id.* at 800. Because the plaintiffs' claim was neither cognizable under Section 1981 nor preserved for appellate review, the court's brief comment about the "full and equal benefit" clause's application to private actors was obiter dicta.

Petitioner's further reliance on the Third Circuit's decision in *Mahone, supra*, is misplaced for two reasons. First, and most importantly, the *Mahone* decision precedes by more than a decade Congress's 1991 amendment of Section 1981, which made explicit that the "rights protected by this

section are protected against impairment by nongovernmental discrimination." 42 U.S.C. 1981(c). Congress's express refutation in statutory text of *Mahone*'s dicta would unquestionably provide a sound basis for the Third Circuit to revisit the scope of the "full and equal benefit" clause in a case that squarely presented the question.[6]

Second, the *Mahone* case involved discrimination by police officers who indisputably were acting under color of state law at the time, 564 F.2d at 1020, 1029, and the court focused its analysis on Section 1981's "like punishment" clause, not the "full and equal benefit" clause, *id.* at 1029-1030. The court's comments about the application of the "full and equal benefit" clause to private conduct thus were dicta, as the court acknowledged. *Id.* at 1030 ("In the instant case, of course, the complaint does allege state action. Certainly the like punishment clause applies to such action. *We need decide no more in this case.*") (emphasis added).[7]

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[6] For that same reason, petitioner's argument (Pet. 14) that the Fourth Circuit has joined the conflict, based on a 1986 decision that this Court overturned in 1987, misses the mark. See *Shaare Tefila Congregation* v. *Cobb*, 785 F.2d 523, 525-526 (1986), rev'd on other grounds, 481 U.S. 615 (1987). That is not to suggest that, prior to the 1991 amendment, the "full and equal benefit" clause did not reach private conduct. To the contrary, this Court had repeatedly held that Section 1981 applies to private conduct. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171, 177 (1989); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 387-388 (1982) ("[T]he prohibitions of § 1981 encompass private as well as governmental action."); *Runyon* v. *McCrary*, 427 U.S. 160, 173 (1976) (stating, without qualification, that Section 1981 "reaches private conduct"); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973); see also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

[7] Further evidencing that the *Mahone* court's statement about the scope of the "full and equal benefit clause was pure dicta is the fact that earlier parts of the opinion support the conclusion that private conduct is covered. Just a few pages before the dicta, the court cited with approval

3. This Case's Interlocutory Posture Further Counsels Against Review

An exercise of this Court's certiorari jurisdiction is also unwarranted because the case's interlocutory posture creates a significant likelihood that the question presented could have no effect on the outcome of this litigation. The Sixth Circuit remanded for further proceedings the question whether the sheriff's deputy, who was serving as petitioner's security officer, was acting under color of state law when he directed Chapman to submit to a strip search. Pet. App. 17-18. If, after further proceedings addressing this fact-intensive inquiry, the officer is found to have acted under color of state law, then the officer's actions could trigger liability under Section 1981 even under petitioner's reading of the statute.[8] The prospect that further proceedings will render questions of law either moot or irrelevant to the litigation at hand is one of the central reasons that this Court

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Central Presbyterian Church v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), a case where, in the *Mahone* court's words, "[t]he Equal Benefit clause" was applied to the private "defendants' interruptions of the Church's Sunday services." 564 F.2d at 1027. The *Mahone* court then went on to endorse that decision, stating that "[o]ur own examination of the language of section 1981 leads us to believe that its reach is as wide as these cases would indicate." *Ibid.* On the next page, the *Mahone* court stressed that Section 1981 was enacted pursuant to the Thirteenth Amendment and was intended "to eradicate *all* discrimination against blacks and to secure for them full freedom and equality in civil rights." *Id.* at 1028.

[8] See generally *Morris* v. *Dillard Dep't Stores, Inc.*, 277 F.3d 743, 747-751 (5th Cir. 2001) (discussing the case-specific factors to be considered in deciding whether a department store will be considered to have acted under color of state law based on the conduct of an off-duty police officer serving as a security guard). Petitioner identifies no reason why 42 U.S.C. 1981 would have a more cramped definition of .e action than 42 U.S.C. 1983.

rarely grants review in cases arising in just such an interlocutory posture.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

R. ALEXANDER ACOSTA
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

MARK L. GROSS
TERESA KWONG
Attorneys

MAY 2004

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[9] See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J.) (denial of certiorari on interlocutory appeal), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review after final judgment).

MOTION FILED

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No. 02-1646

In The
Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a
DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE OHIO COUNCIL OF RETAIL MERCHANTS, KENTUCKY RETAIL FEDERATION, INC., AND TENNESSEE COUNCIL OF RETAIL MERCHANTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF PETITIONER THE HIGBEE COMPANY, d/b/a DILLARD DEPARTMENT STORES, INC.

THOMAS M. TARPY
Counsel of Record
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6209

Counsel for Amici Curiae Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants respectfully move the Court, pursuant to Rule 37.2(b), for leave to file a brief as amici curiae in this matter in support of the Petition for a Writ of Certiorari. Movants have been unable to secure the consent of Respondent to the filing of their brief.

Movants are state-wide trade associations that have represented thousands of retailers, from large department stores and chain drug stores to independently-owned businesses, for as long as 80 years. They have followed the instant litigation with great interest, and all three participated as amici curiae in the proceedings below. Movants can offer the Court a unique perspective on the issues raised by Petitioner and the practical importance of those issues for merchants everywhere. Finally, they strongly believe that the United States Court of Appeals for the Sixth Circuit erred in extending the "full and equal benefit" clause of 42 U.S.C. § 1981(a) to non-governmental actors, including their members, and seek the opportunity to address those issues.

Respectfully submitted,

THOMAS M. TARPY
Counsel of Record
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6209

Counsel for Amici Curiae Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amicus Curiae Ohio Council of Retail Merchants ("OCRM") is a state-wide trade association representing over 3,000 companies, ranging from large department stores, supermarkets, and chain drugstores, to independently-owned retail businesses that sell furniture, appliances, clothing, and other goods. Founded in 1922, OCRM has served legislators, government officials, courts, media, and the public as the voice of retailing for over 80 years.

Amicus curiae Kentucky Retail Federation, Inc., is a state-wide retail trade association with over 2,200 direct members and many associate members. It includes retailers of all types and of all sizes throughout the Commonwealth of Kentucky. Originally established in 1939 as the Kentucky Chain Store Council, it expanded to include independent retailers and took its present form in 1964. It represents the retail industry through government relations activities, direct member services, and efforts to provide education and information to the industry and to the general public.

Amicus curiae Tennessee Council of Retail Merchants is a state-wide trade association representing retail merchants in Tennessee. It is a non-profit corporation organized in 1991 to communicate information and to protect the business interests of retailers.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

All three Amici Curiae have a vital interest in the legal issue underlying these proceedings, and they urge the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Amici Curiae are extremely concerned about the negative effects that the ruling below will have on their members, on the courts, and on the doctrine of federalism if it is not reviewed and reversed by this Court. In particular, the expansive scope that ruling accords to the "full and equal benefit" clause of 42 U.S.C. § 1981 would federalize all state statutory and common law claims that assert a racial animus, imposing severe – and wholly unnecessary – burdens on the members of Amici Curiae.

Retailers must constantly guard against losses from shoplifting and theft, which cost them over $32 billion annually in this country. Inventory "shrinkage" in retail stores has become the single largest category of larceny in the United States, costing merchants almost two percent of their total annual sales. Under the best of circumstances, these crimes reduce profits and increase the prices that consumers must pay. In other cases, they threaten the financial viability of a business and the continued existence of the jobs that it sustains.

Confrontations with suspected shoplifters often elicit charges of racial bias, even where, as in the present case, Chapman and the security guard were both African-American women. Adequate legal remedies are currently available under state law for any resulting legal claims. Retailers should not be saddled with the additional unnecessary expense of litigating shoplifters' Section 1981(a) lawsuits in federal courts. There is no legal or logical justification for federalizing a vast array of state law claims against retail merchants.

Accordingly, Amici Curiae join with Petitioner in urging the Court to grant the petition for a writ of certiorari in this matter.

SUMMARY OF THE ARGUMENT

Amici curiae, Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants, urge the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this matter. The Court should review and reverse the ruling below to provide guidance to lower courts regarding the proper scope of the "full and equal benefit" clause of 42 U.S.C. § 1981(a). Only this Court's intervention can resolve the ongoing conflict among the different circuits as to whether that clause is directed to state action only or whether it also encompasses purely private conduct.

The opposing views that the federal courts have expressed on that question suggest that the statute is ambiguous. Even if it is facially unambiguous, federal courts have long recognized that they must look beyond the literal language of a statute when a literal reading leads to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress.

The construction of Section 1981 by the en banc majority below fails on all three counts. First, it leads to internal inconsistencies by prohibiting conduct that is impossible. If subsection (c) of the statute extends all of the proscriptions included in subsection (a) of the statute to private actors, it forbids non-governmental actors from doing what they already, by definition, cannot do, *e.g.*,

discriminate in levying taxes and deprive litigants of proper judicial proceedings. Second, the interpretation adopted by the en banc ruling below leads to the absurd result of federalizing vast amounts of state statutory and common law, going far beyond anything Congress has previously done in this area of law. Third, and finally, it is inconsistent with the intent of Congress, which indisputably enacted Section 1981(c) in order to define the scope of claims under the "make and enforce contracts" clause of Section 1981(a), and not to radically remake civil rights law and upset the balance of federalism in this country.

Accordingly, Amici Curiae respectfully support Petitioner in these proceedings and urge the Court to grant its petition for a writ of certiorari.

ARGUMENT

1. Introduction. Amici Curiae Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants support Petitioner The Higbee Company, d/b/a Dillard Department Stores, Inc., in urging the Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this matter.

The Court should review the en banc ruling below because it escalates an ongoing conflict among different circuits on an important question of federal law: whether the "full and equal benefit" clause of 42 U.S.C. § 1981(a) applies only to state action, or whether it encompasses purely private conduct as well. Only the Supreme Court of the United States can resolve that conflict.

In the past, this Court and Congress have addressed the scope of the "make and enforce contracts" clause and other language in § 1981(a). However, there is still no authoritative guidance for adjudicating claims asserted under the "full and equal benefit" clause. The resulting fissure in the decisions of the United States Courts of Appeals regarding the applicability of the "full and equal benefit" clause to private acts by non-governmental actors is not merely a theoretical issue. The varying legal standards used by courts in different circuits thwart the uniform application of federal civil rights laws.

The substantive question at the root of the lower courts' conflicting decisions also raises important issues of federalism that merit this Court's review. If the en banc decision of the Court of Appeals for the Sixth Circuit is not reviewed and reversed, it will effectively federalize any asserted violation of state statutory or common law in which a racial animus is alleged.

For example, unfounded accusations of racial discrimination are not an uncommon response when retail security personnel confront suspected shoplifters. The retail merchants represented by Amici Curiae must bear the resulting costs and other burdens if the "full and equal benefit" clause of Section 1981(a) can be invoked to make a federal case out of these purely private interactions. Significantly, Respondent Chapman does not contend that existing legal protections are inadequate in any way; she argues instead that a federal forum and a federal remedy should be added to the arsenal of claims that are admittedly already available to redress the wrong she alleges in this litigation.

As set forth below, there can be little doubt that the "full and equal benefit" clause is limited in purpose and effect to conduct by governmental actors, and it is unnecessary and unwise to expand its reach to encompass purely private conduct. Accordingly, Amici Curiae support Petitioner in urging the Court to grant the petition for a writ of certiorari in this matter.

2. Section 1981(c). Respondent Chapman argues that subsection (c) of the statute unambiguously subjects private actors to every clause of subsection (a) of the statute, including the "full and equal benefit" clause. The initial panel of the Court of Appeals for the Sixth Circuit agreed with Respondent that the statute is unambiguous, but it concluded that subsection (c) does *not* extend the scope of the "full and equal benefit" clause to private actors. The Court en banc voted 6-3 to reverse that ruling, after it concluded that the statute unambiguously extends the "full and equal benefit" clause to purely private conduct. In these circumstances, the statutory language is *ambiguous* by any realistic definition of that term.

However, the judicial task would not be at an end in this case even if the language of Section 1981(c) appeared to be clear on its face:

> The court must look beyond the language of the statute, however, when the text is ambiguous or when, although the statute is facially clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress.

Vergos v. Gregg's Enterprises, Inc., 159 F.3d 989, 990 (6th Cir. 1998), citing *United States v. Turkette*, 452 U.S. 576,

580 (1981). Each of the three specified grounds for statutory interpretation applies here, and each provides a separate and independent basis for finding that the "full and equal benefit" clause of Section 1981(a) applies only to state action. Considered together, they provide compelling reasons to review the ruling below and restore uniformity to lower court interpretations of this federal civil rights law.

3. Internal inconsistencies. As noted above, a court "must look beyond the language of [a] statute" when "a literal interpretation would lead to internal inconsistencies." *Vergos*, *supra*. The relevant language of Section 1981 falls squarely within that rule.

Congress amended Section 1981 in 1991 by adding subsection (b), which specifies, inter alia, that the right to "make and enforce contracts" continues after a contract is formed, and subsection (c), which provides that "[t]he rights protected by this section are protected against impairment by non-governmental discrimination and discrimination under color of state law." 42 U.S.C. § 1981(c).

Respondent Chapman contends that subsection (c) of the statute proscribes private actors from infringing *all* four of the categories of rights set out in subsection (a) of the statute: "to make and enforce contracts"; "to sue, be parties, give evidence"; "to the full and equal benefit of all laws and proceedings for the security of persons and property"; *and* to be "subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind." 42 U.S.C. § 1981(a).

Some of the rights included in Section 1981(a) – such as the right to make contracts – involve conduct that can

be engaged in by either private or governmental actors. However, other categories of rights found in Section 1981(a) – such as the clauses guaranteeing the "full and equal benefit of all laws and proceedings" and "like punishment, pains, penalties, taxes, licenses, and exactions" – include conduct that is *exclusively governmental in nature* and therefore cannot be engaged in by private actors. Accordingly, Respondent Chapman's interpretation of Section 1981(c) yields internal inconsistencies in the statute.

For example, the power to tax is indisputably the sole prerogative of *governments*. "Only the state imposes or requires 'taxes, licenses, and exactions'. . . . " *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3d Cir. 1977). A private person cannot possibly discriminate against someone through dissimilar taxation, because a private person has no legal capacity to impose or collect taxes. Respondent Chapman's "unambiguous" interpretation of Section 1981(c) should be rejected for this reason alone: it produces the internal inconsistency of proscribing conduct by private persons that only governmental actors can perform.

Similarly, only the government can deprive a person of the "full and equal benefit of all laws and proceedings," because only the government operates the judicial machinery that provides legal proceedings and resolves disputes over legal rights. "[I]t is only the state, acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law." *Mahone v. Waddle*, *supra*, 564 F.2d at 1029. Once again, Respondent Chapman's interpretation of Section 1981(c) leads to an internal inconsistency: prohibiting public acts that private actors cannot perform.

Amici Curiae urge the Court to reach the common sense conclusion that Section 1981(c) does not extend the scope of every clause in Section 1981(a) to private actors.

4. Absurd results. A court must also look beyond the language of a statute when a "literal interpretation" would lead to "an absurd result." *Vergos, supra*. In the present case, the interpretation of Section 1981 adopted by the en banc majority below – *i.e.*, that subsection (c) extends the scope of every clause of subsection (a) to purely private conduct – would lead to the "absurd result" of federalizing all alleged violations of state statutory or common law in which a racial animus is alleged.

The en banc decision of the Court of Appeals adopted Respondent's reading of Section 1981(c). If the Court does not review and reverse that ruling, every private act of purported discrimination, real or imagined, will be actionable in federal court under federal law. "Extending the 'equal benefit' clause to private conduct would have the effect of federalizing all racially-motivated state-law torts that implicate 'the security of persons and property'. . . . [T]he court sees no limiting principle to prevent its becoming the 'general federal tort law' the Supreme Court has expressly rejected." *Spencer v. Casavilla*, 839 F. Supp. 1014, 1019 (S.D. N.Y. 1993), *aff'd in part on other grds*, 44 F.3d 74 (2d Cir. 1994).

The Court of Appeals should have rejected Respondent Chapman's interpretation of Section 1981(c) because it leads to the absurd result of federalizing vast areas of state law and upsetting the traditional balance between state and federal authority. This consideration, standing alone, is important enough to warrant review of the decision below.

5. Intent of Congress. Finally, a court must also look beyond a literal interpretation of a statute if it is inconsistent with the intent of Congress. *Vergos*, *supra*, 489 U.S. at 241. In the present case, Congress indisputably intended precisely the opposite result that the en banc majority reached below. The legislative record *unequivocally* establishes that it was not Congress' intent to eliminate the state action requirement for suits brought under the "full and equal benefit" clause of Section 1981(a) when it enacted subsection (c).

It is undisputed that Congress added subsection (c) to Section 1981 for the purpose of codifying the ruling in *Runyon v. McCrary*, 427 U.S. 160, 175 (1976), which applied the "make and enforce contracts" clause of Section 1981(a) to private conduct. *See* H. Rep. No. 40, 102d Cong. 1st Sess., Part II, at 37:

> This subsection [(c)] is intended to codify *Runyon v. McCrary* . . . [in which] the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, *contracting*.

(Emphasis added.) The House Report reiterated Congress' intention that subsection (c) of the statute was added in order to "prohibit racial discrimination *in all contracts*, both public and private." *Id.* (emphasis added). *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[t]he authoritative source for finding the Legislature's intent lies in the Committee's reports on the bill").

In addition, the title Congress gave to subsection (c) – "Prohibiting discrimination in private contracting" – demonstrates that it was intended to abrogate the state action requirement as to the "make and enforce contracts"

clause. *See* H. Rep. No. 40, *supra*, at 37. Indeed, Congress entitled the Civil Rights Act of 1991 "Restoring Prohibition Against All Racial Discrimination *in the Making and Enforcement of Contracts*." *Id.*, at 35 (emphasis added). *See I.N.S. v. Nat. Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"). Thus, the title of the Act, the title of the relevant subsection, the legislative history, and Congress' avowed purpose in enacting 42 U.S.C. § 1981(c) each contradict the expansive interpretation of the statute adopted by the Court of Appeals.

Two United States Courts of Appeals that previously addressed this specific issue concluded that subsection (c) does not expand the scope of the "full and equal benefit" clause of Section 1981 to private action. In *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F. 3d 851, 855 (8th Cir. 2001), *cert. den.*, 535 U.S. 1017 (2002), as in the present case, a customer brought suit against a retail store for violation of the "full and equal benefit" clause of Section 1981 after he was detained by store employees on suspicion of shoplifting; the Court of Appeals for the Eighth Circuit held that the clause applies only to *state* action and dismissed the claim. *See also Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001). In *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir. 2001), the Court of Appeals for the Third Circuit cited and endorsed the "substantial line of authority holding that only state actors can be sued under the 'full and equal benefit' clause of § 1981."

The en banc majority in the present case erred when it reached the opposite conclusion and held that the clause encompasses purely private conduct. Amici Curiae urge

the Court to review the ruling below and restore the uniform interpretation and application of Section 1981(a) that Congress intended.

CONCLUSION

Amici Curiae retail trade associations urge the Court to grant the petition for a writ of certiorari in this matter. The ruling below, if not reviewed and reversed by this Court, would create a sweeping new federal tort that federalizes a vast array of state law claims under the "full and equal benefit" clause of 42 U.S.C. § 1981(a). Respondent has never claimed that existing state law remedies are inadequate, and there is thus no legal or logical reason to expand the scope of the "full and equal benefit" clause beyond its historical limitation to governmental conduct.

The decision below rests solely upon an interpretation of the language of 42 U.S.C. § 1981(c) that leads to internal inconsistencies, such as forbidding private individuals from levying unfair taxes, and to the absurd result of federalizing much of state tort law. It also contradicts the relevant legislative history, the title of the statutory provision, and Congress' stated purpose in enacting the legislation. Not surprisingly, that interpretation has been specifically rejected by other United States Courts of Appeals that have addressed the issue, resulting in a conflict among the circuits that only this Court can resolve.

Amici Curiae urge the Court to review and reject this attempt to convert alleged violations of state laws by private individuals into federal lawsuits, under the guise of the "full and equal benefit" clause of 42 U.S.C.

§ 1981(a), by granting the petition for a writ of certiorari in this matter.

Respectfully submitted,

THOMAS M. TARPY
Counsel of Record
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6209

Counsel for Amici Curiae Ohio Council of Retail Merchants, Kentucky Retail Federation, Inc., and Tennessee Council of Retail Merchants